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JOSEPH F. SPANIOLO, JR.
CLERK

No. 89-5809

In The
Supreme Court of the United States
October Term, 1989

ROBERT SAWYER,

Petitioner,

vs.

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,*Respondent.*

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME II

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Caption omitted in printing)

ORDER

(Filed April 9, 1987)

The Court, after considering the petition, the record, the law applicable to the case, and the Magistrate's Finding and Recommendation, hereby approves the Magistrate's Finding and Recommendation and adopts it as its opinion, with the comments and corrections noted herein.

In view of the serious nature of the petitioner's allegations pertaining to the trial court's appointment of counsel with less than five years experience in violation of Article 512 of the Louisiana Code of Criminal Procedure, the Court makes the following additional comments:

The petitioner contends that the trial court's noncompliance with Article 512 of the Louisiana Code of Criminal Procedure deprived him of equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution. We find it unnecessary to reach the merits of the petitioner's equal protection and due process claims, because even if the trial court's appointment of counsel with less than five years experience violated the petitioner's Fourteenth Amendment rights, the record reveals that the error was harmless beyond a reasonable doubt. Because we assume for argument's sake that an error was committed, we must now engage in a two-part analysis: (1) Can this type of error ever be treated as harmless, and (2) if so, was the violation harmless in this case.

Discussing the purpose and the application of the federal harmless error rule, the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), noted: "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23. The *Chapman* court gave examples of such "basic" constitutional rights: the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); the right to be tried by an impartial judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); and the right to have coerced confessions deemed inadmissible at trial, *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958). By contrast, there are other constitutional errors "which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless. . . ." *Chapman*, 386 U.S. at 22.

The petitioner contends that the trial court's appointment of counsel with less than five years experience violated one of his "basic" constitutional rights therefore making a harmless error inquiry improper. Furthermore, the petitioner asserts that the harmless error principle can never be applied to due process or equal protection claims. We find no merit in petitioner's arguments. A due process or equal protection error, like most other constitutional errors, can be held harmless. See *Cancler v. Maggio*, 550 F.2d 1034 (5th Cir. 1977); *Hills v. Henderson*, 529 F.2d 397, 401-02 n.8 (5th Cir. 1976). The only time a harmless error inquiry is not appropriate is when the constitutional right violated is included in *Chapman's* "so

basic to a fair trial" category. Any right to five-year counsel in a capital case is not included in this category.

Our next inquiry is whether the trial court's appointment of counsel with less than five years experience constitutes harmless error in this case. The *Chapman* court pronounced that an error is not harmless where there is a "reasonable possibility" that the error complained of "might have contributed to the conviction". *Chapman*, 386 U.S. at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)). The Court placed the burden upon the state to prove that the error was harmless. *Chapman*, 386 U.S. at 24. Although the Supreme Court continues to rely upon *Chapman* in its harmless error decisions, the Court has shifted its inquiry from whether the error "might have contributed to the conviction" to whether there was overwhelming independent evidence of guilt. Under the revised test, an error is harmless where, absent the error, the evidence was so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. *United States v. Hastings*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96, 108 (1983); *Brown v. United States*, 411 U.S. 223, 230-32, 93 S.Ct. 1565, 1569-70, 36 L.Ed.2d 208, 215 (1973); *Milton v. Wainwright*, 407 U.S. 371, 377-78, 92 S.Ct. 2174, 2177-78, 33 L.Ed.2d 1, 6-7 (1972); *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284, 288 (1969). This overwhelming independent evidence test is consistent with the purpose of the harmless error rule as stated in *Chapman* - to "block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." 386 U.S. at 22. Moreover, the United States Fifth Circuit has recognized

the overwhelming independent evidence test as the proper harmless error standard. *Germany v. Estelle*, 639 F.2d 1301 (1981), *Harryman v. Estelle*, 616 F.2d 870 (1980).

After examining the record, and the effect of the trial court's noncompliance with Article 512 in this particular case, we conclude that any error committed by the trial court in not appointing five-year counsel was harmless beyond a reasonable doubt.

In light of the recent United States Supreme Court ruling in *Lockhart v. McCree*, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) which addressed the same issue as that raised by Mr. Sawyer in ground ten of his application for habeas corpus relief, we find it necessary to comment upon the effect of that decision in the case at hand.

The petitioner has alleged that the state trial court's removal of a juror who expressed opposition to the death penalty deprived him of the right to have his guilt or innocence determined by a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution. In January of 1986, this Court stayed the execution of the petitioner pending a ruling on the same issue by the United States Supreme Court in *Lockhart v. McCree*. The Supreme Court rendered its decision on May 5, 1986. The *Lockhart* court held that the removal of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors does not violate the requirement that a jury must represent a fair cross section of the community.

After carefully reviewing the record and transcript in this case, we conclude that the petitioner's claim is without merit. The record supports the state trial court's determination that the juror's opposition to the death penalty would have prevented her from properly and impartially applying the law to the facts, thereby substantially impairing the performance of her duties as juror.

The Court makes the following corrections to the Magistrate's Finding and Recommendation:

Page 1, lines 15-16: the citation should read "*Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)".

Page 6, lines 18: "even" should read "ever".

Page 7, line 31: "grounds" should read "ground".

Page 11, footnote 4, line 4: the citation should read: "*Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 n.1 (La. 1976)".

Page 14, line 5: the citation should read "*McCrae v. Blackburn*, 793 F.2d 684, 688 (5th Cir. 1986)".

Page 14, line 6: "more" should read "less".

Page 24, line 9: "of itself" should read "in itself".

Page 30, line 18: "[d]oes" should read "does".

Page 30, line 20: the citation should read "28 U.S.C. § 2254".

Page 34, line 37: "merely" should read "nearly".

Page 35, line 25: "the" should read "this".

Page 37, line 24: "the" should read "that".

Page 39, line 15: a comma should follow "specific intent".

Page 42, footnote 8, line 10: "inapposit" should read "inapposite".

Page 44, lines 15-16: the citation should read "*Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)".

Page 45, line 9: "constitutinal" should read "constitutional".

Page 45, footnote 9, line 6: "[a]dequately" should read "adequately".

Page 45, footnote 9, line 8: "offenses" should read "offenders".

Page 46, line 14: the citation should read "*Sawyer v. State*, 442 So.2d 1136 at 1139-40".

Page 49, line 5: "[t]he" should read "the".

Accordingly,

IT IS ORDERED that the application filed on behalf of petitioner, Robert Sawyer, is hereby DENIED.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on January 21, 1986 is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ Harry A. Menty
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Caption omitted in printing)

JUDGMENT

For the reasons of the Court on file herein, accordingly:

IT IS ORDERED, ADJUDGED, and DECREED that there be judgment in favor of the defendant, Frank Blackburn, Warden, and against the petitioner, Robert Sawyer, dismissing the petitioner's application for a writ of habeas corpus.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the stay of execution entered by this Court on January 21, 1986 be and is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ Harry A. Menty
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals,
Fifth Circuit

Robert SAWYER, Petitioner-Appellant,

v.

**Robert H. BUTLER, Sr., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.**

No. 87-3274.

June 30, 1988.

Order Granting Rehearing En Banc
Aug. 25, 1988.

Before GEE, KING and DAVIS, Circuit Judges.

KING, Circuit Judge:

Robert Sawyer appeals from the district court's denial of his petition for writ of habeas corpus, and its concomitant entry of an order rescinding Sawyer's stay of execution. On appeal, Sawyer argues that his conviction for first degree murder should be reversed both because he was denied effective assistance of counsel and because the state trial court, by failing to comply with a state law requiring that counsel assigned in a capital case must have been admitted to the bar for at least five years, violated Sawyer's constitutional due process and equal protection rights. In addition, Sawyer argues that the prosecutor's closing argument in the sentencing phase of his trial violated the eighth amendment by erroneously misleading the jurors concerning their role as the final arbiters of death. As we agree with the district court that Sawyer's challenges to his conviction and sentence do not warrant habeas relief, we affirm the district court's judgment.

I.

Robert Sawyer ("Sawyer") is a state prisoner currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. Sawyer and Charles Lane ("Lane") were charged with first degree murder for the gruesome slaying of Frances Arwood.¹ Both were ultimately tried

¹ The district court adopted the following statement of facts as set forth in the opinion of the Supreme Court of Louisiana in Sawyer's case:

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

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separately. Sawyer was represented at trial by his court-appointed attorney, James Weidner ("Weidner"). Sawyer

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The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his first, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her

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was originally represented by Wiley Beevers ("Beevers"). It was Beevers who had initially brought Weidner into

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with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

State v. Sawyer, 422 So.2d at 97-98.

the case by asking him to assist as co-counsel. Beevers subsequently withdrew from the case when Sawyer refused to accept a plea bargain offered by the prosecutor and Weidner was left as sole counsel. Upon receiving his appointment, Weidner informed the trial court that he was not a "death-qualified" attorney because he lacked five years experience as required for appointed counsel in capital cases by article 512 of the Louisiana Code of Criminal Procedure.² The trial court told Weidner to get an experienced counsel to "sit" with him. Weidner managed to secure some assistance from several other attorneys, but no "death-qualified" attorney was ever appointed as co-counsel. Neither party disputes the fact that the terms of article 512 were not complied with. Sawyer was convicted of first degree murder and sentenced to death by a jury on September 19, 1980.

His conviction and sentence were affirmed by the Louisiana Supreme Court. *See State v. Sawyer*, 422 So.2d 95 (La. 1982). Sawyer's petition for a writ of certiorari to the United States Supreme Court was granted and the case was remanded with instructions for the Louisiana Supreme Court to reconsider its ruling in light of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235

² Article 512 provides, In pertinent part:

When a defendant charged with a capital offense appears for arraignment without counsel, the court shall assign counsel for his defense. Such counsel may be assigned earlier, but must be assigned before the defendant pleads to the indictment. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel.

(1983). *See Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the Louisiana Supreme Court again affirmed the death sentence, *see Sawyer v. Louisiana*, 442 So.2d 1136 (La. 1983), and Sawyer's subsequent petition for writ of certiorari was denied, *see Sawyer v. Louisiana*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). At this point, Sawyer sought state habeas relief which was ultimately unsuccessful. *See Sawyer v. Maggio*, 479 So.2d 360 (La. 1985); *Sawyer v. Maggio*, 480 So.2d 313 (La. 1985).

Having exhausted his state remedies, Sawyer filed a federal habeas petition in the United States District Court for the Eastern District of Louisiana. In his petition, Sawyer argued, among other things, that he received ineffective assistance of counsel, and that the state trial court's failure to comply with article 512 violated his due process and equal protection rights. Moreover, Sawyer claimed that the prosecutor's closing argument in the sentencing phase of his trial erroneously misled the jury as to their role as the final arbiters of death and, therefore, violated the eighth amendment. After granting Sawyer a stay of execution, the district court assigned Sawyer's case to a magistrate for a hearing. On September 9, 1986, the magistrate submitted his proposed findings and recommended to the district court that Sawyer's petition be denied and the stay of execution be vacated. With respect to Sawyer's ineffective assistance of counsel claim, the magistrate concluded that Sawyer had failed to demonstrate that he was prejudiced by any of Weidner's allegedly deficient actions as counsel. As to the state trial court's non-compliance with article 512, the magistrate

began by noting that the state trial judge, after the evidentiary hearing, concluded that the violation is not fatal to a capital conviction when the defendant actually received effective assistance of counsel. The magistrate, therefore, refused to reach the issue of whether Sawyer's due process and equal protection rights were actually violated "since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. *Chapman v. California*, 386 U.S. 18 [1, 87 S.Ct. 824, 17 L.Ed.2d 705] (1967)." Finally, the magistrate concluded that the prosecutor's remarks in his closing argument during the penalty phase were distinguishable from those condemned in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), as violative of the eighth amendment. Moreover, after concluding that "[r]eference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty," the magistrate went on to conclude that since "there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different," resentencing would be inappropriate.

On April 8, 1987, the district court issued its ruling adopting the magistrate's findings and recommendations in an order incorporating several amendments to the magistrate's opinion.³ The district court also examined, in

³ For the balance of this opinion, we will refer to the magistrate's findings and recommendations, as corrected by the district court, and the district court's additions to the magistrate's report collectively as the district court's conclusions.

greater detail, the question of whether *Chapman's* harmless error analysis applies to the alleged constitutional violations in the instant case. The district court concluded that a *Chapman* analysis was appropriate since the state trial court's failure to appoint counsel with five years experience could not be classified as a violation of constitutional rights "so basic to a fair trial" as to preclude the harmless error inquiry. The district court found no merit in Sawyer's assertion that harmless error analysis can never be applied to due process or equal protection errors. Finally, the district court found that the state trial court's appointment of counsel with less than five years experience in the instant case was indeed harmless since the evidence against Sawyer was so overwhelming as to establish his guilt beyond a reasonable doubt. Sawyer filed timely notice of appeal and was granted a certificate of probable cause to appeal and a stay of execution pending appeal. We have jurisdiction under Title 28, United States Code, section 2253.

II.

On appeal, Sawyer raises three challenges to his confinement and sentence. First, Sawyer argues that he was accorded ineffective assistance by his "inexperienced appointed counsel, who was not lawfully qualified to represent a capital defendant," in violation of the sixth amendment. Next, Sawyer argues that the state trial court's failure to comply with article 512 violated Sawyer's constitutional due process and equal protection rights. He contends that the district court erred in applying a harmless error analysis to his claims for they are related to the integrity of the trial process itself and, as

such, are not proper subjects for a *Chapman* inquiry. Finally, Sawyer contends that certain improper remarks by the prosecutor in closing arguments at the sentencing phase of Sawyer's trial erroneously misled the jury as to their role in the death penalty determination, and, therefore, violated the eighth amendment as interpreted in *Caldwell*. Sawyer also takes issue with the district court's imposition of a prejudice requirement on his *Caldwell* violation claims. We will consider each of these arguments in turn.⁴

⁴ Sawyer also argues briefly that since the jury was allowed to weight an aggravating circumstance that was later held to have been improperly submitted, his death sentence was imposed in violation of the eighth amendment. Specifically, the jury found that Sawyer had previously been convicted of an unrelated murder because he was indicted in Arkansas for second degree murder in the killing of a child, and pled guilty to involuntary manslaughter for that crime. The Louisiana Supreme Court, however, ruled that a conviction for involuntary manslaughter could not support a finding that Sawyer had previously been convicted of an unrelated murder. *Sawyer*, 422 So.2d at 101. The Louisiana Supreme Court concluded that the evidence of Sawyer's prior conviction was properly admitted, however, and did not inject an arbitrary factor into the sentencing proceeding. *Id.* at 104. Sawyer's argument to the contrary is of no moment. As we have stated:

The fact that an invalid statutory aggravating circumstance has been found does not constitutionally impair a death sentence under the Louisiana procedure where the jury has also found another aggravating circumstance which is supported by the evidence and is valid under the law and of itself suffices (sic) to authorize the imposition of the death penalty.

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III.

A. Ineffective Assistance of Counsel

Sawyer points to a number of alleged deficiencies in Weidner's performance at trial as support for his allegation of ineffective assistance of counsel. Specifically, Sawyer noted that Weidner: (1) failed to ask the jurors about their attitudes towards the death penalty during voir dire; (2) objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase; (3) failed to object to several inadmissible, inflammatory remarks by the prosecutor; (4) produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as his chief defenses to

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James v. Butler, 827 F.2d 1006, 1013 (5th Cir. 1987); see also *Byrne v. Butler*, 845 F.2d 501, 501, 514-15 (5th Cir.1988).

Sawyer does not dispute that the jury properly found two other aggravating circumstances, namely that the crime was committed in a particularly heinous manner and that it occurred during the perpetration of arson. The Louisiana Supreme Court concluded that the evidence was clearly sufficient to support the jury's findings with respect to those aggravating circumstances, *Sawyer*, 422 So.2d at 101, and "[t]hat court's determination is entitled to great weight in our review," *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir.1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987). In fact, Sawyer does not argue that the evidence was insufficient to support the other aggravating circumstances. Those aggravating circumstances were sufficient to authorize the imposition of the death penalty and Sawyer has not challenged their legal validity in this case. Sawyer's sentence, therefore, was not constitutionally impaired by the submission of the invalid aggravating circumstance. See *Byrne*, at 515.

negate the specific intent required for first degree murder; (5) failed to make a closing argument, at the guilt phase of trial; and (6) failed to prepare a competent penalty phase presentation.

Sawyer's claims of ineffective assistance of counsel must be evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The test requires first, "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and second, a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair and reliable trial. *Uresti v. Lynaugh*, 821 F.2d 1099, 1101 (5th Cir.1987) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). The burden that *Strickland* imposes on a defendant is severe. *Procter v. Butler*, 831 F.2d 1251, 1255 (5th Cir.1987). In order to satisfy the deficiency prong of the *Strickland* test, for example, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 935, 93 L.Ed.2d 985 (1987). Given the almost infinite variety of possible trial techniques and tactics available to counsel, we must be careful not to second guess legitimate strategic choices which may now, under the distorting light of hindsight, seem ill-advised and unreasonable. We have stressed that, "great deference is given to counsel, 'strongly presuming that counsel has exercised reasonable professional judgment.'" *Martin*, 796 F.2d at 816 (quoting *Lockhart v. McCotter*, 782 F.2d

1275, 1279 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 873, 93 L.Ed.2d 827 (1987)).

In evaluating whether counsel's alleged errors prejudiced the defense, "[i]t is not enough for the defendant to show that the errors has some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Rather, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. "It is not our role to assume the existence of prejudice." *Czere v. Butler* 833 F.2d 59, 64 (5th Cir.1987). On the contrary. *Strickland* requires that the defendant affirmatively prove prejudice. *Id.* *Strickland* also authorizes us to proceed directly to the question of prejudice. Therefore, if Sawyer fails to demonstrate prejudice, the alleged deficiencies in Weidner's performance need not even be considered. See *Strickland*, 466 U.S. at 698-99, 104 S.Ct. at 2070; *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir.1984). Since both the performance and prejudice comments of the ineffectiveness inquiry are mixed questions of law and fact, we must make an independent determination of whether the representation accorded Sawyer by counsel passed constitutional muster. *Ricalday v. Procunier*, 736 F.2d 203, 206 (5th Cir.1984); *Trass v. Maggio*, 731 F.2d 288, 292 (5th Cir.1984). With these considerations in mind, we now turn to the merits of Sawyer's contentions.⁵

⁵ In addition to his specific allegations of Weidner's ineffectiveness. Sawyer also contends that Weidner's failure to meet article 512's standards for death qualification rendered

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With respect to Sawyer's objections to voir dire, we need not decide whether counsel's failure to question prospective jurors about their views on the death penalty was professionally unreasonable because Sawyer has failed to demonstrate prejudice. Sawyer does not dispute the fact that the State questioned the prospective jurors on this point. Rather, Sawyer asserts that because "the actual value of the rights [counsel] so casually sacrificed cannot

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his assistance as counsel unreasonable *per se* under "prevailing professional norms." See *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. Sawyer asserts that "prejudice from this form of inadequate representation may be presumed." We need not address the first contention for we do not agree with Sawyer that counsel's failure to meet the state law standard was presumptively prejudicial. In support of this proposition. Sawyer relies on language from *Strickland* to the effect that prejudice may be presumed: (1) where "prejudice . . . is so likely that case by case inquiry is not worth the cost;" and (2) where the impairment of the sixth amendment right is "easy to identify and, for that reason . . . easy for the government to prevent." See *id.* at 692, 104 S.Ct. at 2067. Sawyer's reading of *Strickland* as establishing a generally applicable two-pronged test for presumptive prejudice is clearly in error. The Court in *Strickland* included the aforementioned language merely to illustrate why it presumes prejudice where there has been an actual or constructive denial of the assistance of counsel altogether, or where the state has prevented counsel from assisting the accused during a critical stage of the proceedings. See *id.* (citing *United States v. Cronin*, 466 U.S. 648, 659 & n. 25, 104 S.Ct. 2039, 2047 & n. 25, 80 L.Ed.2d 657 (1984)). The state trial court's failure to comply with article 512 did not result in an actual or constructive denial of the assistance of counsel. Therefore, we are unwilling to extend *Strickland's* limited relaxation of the prejudice requirement to the facts of this case. Sawyer's claims are subject to the general requirement that the defendant affirmatively prove prejudice.

be measured in concrete terms," *Strickland* would excuse his failure to affirmatively demonstrate – or concretely allege – prejudice from counsel's actions. Sawyer's novel interpretation of *Strickland* is unsupported by authority and runs counter to our interpretation of that case. Sawyer also alludes to the prejudice which resulted from counsel's failure to rehabilitate veniremen who were excused because of their views contrary to the death penalty. Sawyer fails, however, to demonstrate that rehabilitation was possible. Unsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of. We find no merit in Sawyer's allegations that counsel's voir dire performance constituted ineffective representation of counsel.

At trial, Weidner objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase. Sawyer asserts that he was prejudiced by this objection because "[w]ithout this information, the jury would never realize that a conviction for second degree murder carried a mandatory life sentence, so that a vote against first degree would both remove the possibility of a death sentence and also insure permanent incarceration." By objecting to the jury's receipt of this information, Sawyer argues, Weidner deprived his client of any realistic opportunity for a second degree murder conviction and a chance of avoiding the penalty phase of trial. The district court, however, concluded that Sawyer's argument was without merit since "it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder," and because Sawyer's "contention that the jury might have returned a verdict of

manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence."

Once again, Sawyer has failed to affirmatively demonstrate prejudice. He has not shown a reasonable probability that, absent Weidner's objection to the jury's learning of lesser penalties, the jury decision would have been different. We note first that the evidence adduced at trial was more than ample to support the jury's determination that Sawyer was guilty of first degree murder.⁶

⁶ As the district court noted, "[Sawyer] did not seriously contest at trial his involvement in the beating and burning of the victim." In any event, the testimony of Cynthia Shano, an eye witness to the incident, as well as the other testimony and physical evidence introduced at trial, provided a sufficient factual underpinning for the jury's verdict. The Louisiana Supreme Court found that: (1) "[t]here was . . . ample evidence from which a rational juror could have concluded beyond a reasonable doubt that [Sawyer] was engaged in the perpetration of aggravated arson;" (2) Sawyer's actions evinced the specific intent to inflict great bodily harm; and (3) the evidence was "plainly sufficient" to support the conviction. *State v. Sawyer*, 422 So.2d at 99. "That court's determination is entitled to great weight in our review." *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir.1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987).

Sawyer's chief defense at trial was that he lacked the specific intent to commit first degree murder due to intoxication. In reviewing this claim, the Louisiana Supreme Court concluded that "the jury reasonably rejected the defense." *State v. Sawyer*, 422 So.2d at 99. The Louisiana Supreme Court went on to hold that "[t]here was ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found that [Sawyer] acted with specific intent, despite his excessive consumption of alcohol." *Id.* Our review of the record shows this conclusion well supported by the evidence. Sawyer has failed to demonstrate otherwise.

Moreover, Sawyer fails to demonstrate a reasonable probability that the jury would have returned a verdict of guilty to either of the lesser offenses. Finally, as for avoiding the penalty phase of trial in hopes of securing a term of life imprisonment, Sawyer had consistently refused to accept such an offer by way of a plea bargain.⁷

⁷ Sawyer's assertions of prejudice are further belied by Weidner's testimony at the state habeas hearing. At the hearing, Weidner gave the following explanation for his actions:

A.

My reasoning was that I didn't want the jurors to know the penalty for manslaughter was, you know, was twenty-one years. I didn't want them to know that. And that was basically a concession to Robert Sawyer. He was - Robert was insisting that we argue for manslaughter. And in light of the facts of the case, you know, and I explained to Robert I had, you know, "You're asking me to blow whatever credibility I may be able to build with the jury by doing that, especially if they find out that it's a twenty-one year sentence. You know, it's a relatively light sentence: They're going to figure out real quick that you, you know, with the other things, that you could be out of jail relatively soon if they find you guilty of manslaughter."

So, kind of as a compromise between Robert, you know, I agreed we won't let them know what any of the penalties are. Let's try to set it up so that the jury knows that it's death or something else.

Q. So, Mr. Sawyer's anticipation in that area consisted of his instructing you to argue for manslaughter, and not for second degree murder?

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Next, Sawyer contends – however perfunctorily – that Weidner's failure "to object to inadmissible, inflammatory statements by the prosecutor" constituted an example of Weidner's prejudicial representation. Sawyer complains of Weidner's failure to object "to the prosecutor's use of facts not in evidence during voir dire, which facts were never established at trial." Specifically, Sawyer complains of references to the use of a hammer in the commission of the crime. The district court concluded that the prosecutor's reference to the hammer, when "viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict." Moreover, at trial, Weidner objected to the testimony of a state witness who alluded to the use of a hammer during the attack, and requested a mistrial. The trial court denied the request but instructed the jury that "until now there has been no testimony regarding any hammer by any other prior witness so I am going to ask you to disregard those comments and that statement by the witness and don't let that statement prejudice Mr. Sawyer in any way." Sawyer's assertion, therefore, is without merit.

Sawyer's next objection to Weidner's performance concerns counsel's use of expert testimony to support

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- A. Robert had consistently – he had been informed as late as the morning we began the trial that he could plead guilty to first degree murder without the death penalty. And he consistently refused and said "you tell them I will plead guilty to manslaughter and nothing else."

Sawyer's intoxication and toxic psychosis defenses. Sawyer complains that Weidner failed to secure his own expert witnesses and instead relied on "state" experts – psychiatrist who had been appointed to a pre-trial lunacy commission charged with determining whether Sawyer was competent to stand trial – who gave damaging testimony. Each of the psychiatrists in question examined Sawyer for approximately half an hour in connection with the competency proceeding and concluded that Sawyer understood the nature of the charges against him and could assist his attorney in his defense. Weidner was successful in eliciting testimony from them which supported the toxic psychosis defense.⁸ In his habeas

⁸ The following excerpts from the testimony at trial are instructive:

Q. [By Weidner to Doctor Albert DeVilliere] Doctor, on approximately September the 27th, 1979 at some time around the time of 8:00 o'clock in the evening. Robert Sawyer went out to various lounges and began drinking. He drank a combination of MD 20/20 wine, shots of straight whiskey, beer, continued drinking without sleep from say approximately 8:00 p.m. in the evening, all night, his condition has been described at approximately 7:00 a.m. the next morning on September 28 when arriving home he was staggering drunk, barely able to walk.

A. What time?

Q. Approximately 7:00 a.m. in the morning. This is after being drunk all night long, continuing to drink MD 20/20 wine at that time. At some point during the next five to six hours some heinous acts occurred. At approximately 1:30 in

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petition, Sawyer complains that these opinions were based upon a set of hypothetical questions only, and that

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the afternoon Robert Sawyer was described as sitting on the floor with his legs crossed looking glassy eyed and appearing to be in a stupor. This description given by a lay person such as myself, not by any physician.

....

With the facts given to you from that hypothet, Doctor, can you render an opinion as to the condition you believe Robert Sawyer was in during the time.

A. Well based on this information it is very possible a person under a great deal of alcohol and drinking continuously and assuming that the condition described is described by a person is fairly reasonable, a fairly reasonable individual who can assess the situation, you could see he was somewhat of a toxic psychosis. That he was probably, you can't say definitely, but that he probably was suffering with a toxic psychosis.

....

Q. Doctor, a person who is suffering from toxic psychoses is it possible for them to form an intent or to actively desire something to happen?

A. If you make the diagnosis of toxic psychoses it would hardly be likely that that person could form intent to do anything but he is liable to act out in a number of different ways.

....

Q. Now Doctor, in layman's terms could a person in this state, in other words in the state we have

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Weidner should have procured an expert who could have testified as to the actual effect of alcohol on Sawyer. As'

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described with this amount of alcohol be in a stupor, I'm talking about the layman's definition of forming an intent or actively desiring something to happen, could they do that?

A. If you describe a person having the toxic psychoses it is highly unlikely they would be able to do that. Then you have, they could form intent in doing things, their behavior would not be erratic. They could have planned out behavior.

* * *

Q. [By Weidner to Doctor Genevieve Arneson] Would you give us that opinion?

A. Well it is my opinion if Mr. Sawyer drank that much alcohol and his behavior towards the victim is as described by witnesses -

Q. Speak up.

A. Mr. Sawyer had drank that much alcohol and his behavior toward the victim is as described by witnesses, if his behavior is that described by a police officer who came to the house after they were called and he was simply sitting there, with his feet up near the head of the victim, then it would be my opinion that he was, he was psychotic and it was a toxic psychosis secondary to the alcohol.

Q. Doctor, when a person is in a toxic psychosis are they able to form intent?

A. No, not in the usual sense.

the district court noted, "[Sawyer] does not suggest that type of examination would produce the type of results he seeks or that those results would even be obtainable." In addition, Doctor Albert DeVilliere, one of the two experts, testified both at trial and during the sanity hearing that a physician would have to have been at the scene of the crime during its commission to be in a position to render an opinion on Sawyer's intent or the effect of toxic psychosis on that intent at the time of the crime. Finally, as the district court concluded, Sawyer has failed to demonstrate sufficient evidence that he suffered from toxic psychosis to support his claims. His assertions on this point, therefore, are without merit.

Sawyer also points to Weidner's waiver of closing argument at the guilt phase of trial. Sawyer asserts that "[a] failure to give a closing argument constitutes a clear breakdown in the adversary process under [*Strickland*] as the jury must infer that the defense counsel who waives argument has abandoned his client's case, and has nothing to say because he believes him to be guilty." Weidner testified during the state evidentiary hearing that his deliberate decision to dispense with closing argument was based on two separate considerations. First, having dealt with the prosecutor in other trials, Weidner knew that the prosecutor tended towards "mild" closing arguments and "saved all of his big guns" for rebuttal. Therefore, "all [Weidner] could see closing argument was going to do in the guilt phase of the trial was give [the prosecutor] a chance to come back behind [him], show them the picture again . . . and just make it worse." Second, Weidner realized the strong case the state had against Sawyer as to his guilt and felt that the best hope for

salvaging anything for Sawyer was in the penalty phase, where Weidner hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk his credibility with the jury by advancing arguments that the jury might perceive as unsupportable.

The district court concluded that "[w]hile an attorney's decision to waive closing argument might ordinarily deprive a defendant of the effective assistance of counsel, we do not find that to be the result in the case before us." We agree that the waiver of closing argument was not prejudicial on the facts before us. Weidner believed the evidence against Sawyer to be "overwhelming." That view seems to have been shared by all of the attorneys familiar with the case. Beevers, for example, was "convinced that there was overwhelming weight of evidence" against Sawyer and "[he] was concerned . . . about the high probability of a death penalty should [Sawyer] proceed to trial." Samuel Dalton, an attorney who testified for Sawyer at the state habeas evidentiary hearing, also recalled "that the evidence of the homicide was overwhelming." Moreover, we note that closing argument was not needed to organize and explain the defense position. The district court concluded that, "[u]nder the circumstances, the jury could not help but to have understood the nature of Sawyer's defense." After a thorough review of the record, we find no error in the district court's conclusion that the jury was fairly apprised of the nature of Sawyer's defense during voir dire and Weidner's opening statement, and that the testimony of defense witnesses as to aspects of the defense theory was simple and direct.

Sawyer's assertions of prejudice are unsupported by the record. He has failed to demonstrate what counsel might have said at closing that would have a reasonable probability of changing the result of the trial and therefore, in light of Weidner's tactical considerations and the strong evidence against Sawyer, we are unprepared to find that the waiver of closing argument here was prejudicial.

Finally, Sawyer contends that Weidner failed to prepare a competent penalty phase presentation. Specifically, Sawyer points to Weidner's alleged failure to conduct sufficient investigation and uncover relevant mitigating evidence. Sawyer fails, however, to specify what other mitigating evidence was available or how that evidence could have affected the jury's decision. For example, Sawyer complains that Weidner could have called other family witnesses who would have been available to testify about mitigating circumstances. Yet, Sawyer neither describes the substance of that potential testimony nor details how the evidence uncovered would have done more than simply duplicate the testimony of Sawyer's sister and brother-in-law. He also complains that Weidner did not spend enough time preparing the witnesses to testify. It is clear, however, that brevity of consultation is insufficient to warrant habeas relief. *Schwander*, 750 F.2d at 499.

Sawyer also points to Weidner's closing argument as an example of attorney incompetence. In that closing, Weidner reiterated several dominant themes of his case: (1) that the jury bears a great responsibility and that they should be lenient by not "killing" Sawyer; (2) that the death penalty is improper under any circumstances; and

(3) that Sawyer lived through a difficult childhood, had been in a mental hospital and had been drunk during the commission of the offense. While Weidner's closing was, as the district court noted, cursory and perfunctory, Sawyer has failed to affirmatively demonstrate prejudice. The closing was adequate to inform the jury of the defense's position. In addition, Sawyer has not articulated how Weidner's closing affected the jury's decision or could have been improved. Weidner's penalty phase presentation was imperfect but Sawyer has failed to demonstrate that it was constitutionally improper under *Strickland*.

For the foregoing reasons, we conclude that since Sawyer has failed to affirmatively demonstrate prejudice from any of Weidner's allegedly deficient actions as counsel, Sawyer's ineffective assistance claim must fail.

B. *Equal Protection and Due Process*

Sawyer claims that the state trial court's refusal to comply with the terms of article 512 violated his rights to equal protection. We need not, and most certainly do not, reach the question of whether this violation of state law actually rose to the level of an equal protection violation. Even if Sawyer could prove an equal protection violation, that violation would still be subject to a harmless error analysis and, under such an analysis, would clearly fail.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court rejected the notion that errors of constitutional dimension necessarily require reversal of criminal convictions. *Id.* at 21-22, 87 S.Ct. at 826. Since *Chapman*, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should

not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); see also *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986). Despite the strong interests that support the harmless error doctrine,⁹ however, the Court has recognized that some constitutional errors require reversal without regard to the evidence in the particular case. *Rose*, 106 S.Ct. at 3106. This limitation recognizes "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827-828 (emphasis added).

The Court in *Rose* sought to clarify this notion:

The State of course must provide a trial before an impartial judge, with counsel to help the accused defend against the State's charge. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

⁹ As the Court stressed in *Van Arsdall*:

The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Van Arsdall, 475 U.S. at 681, 106 S.Ct. at 1436 (citations omitted).

Rose, 106 S.Ct. at 3106 (citations omitted). Harmless error analysis, therefore, "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Id.* (citing *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436). As the Court stated in *Rose*, "[e]ach of the examples *Chapman* cited of errors that could never be harmless either aborted the basic trial process, or denied it altogether." *Rose*, 106 S.Ct. at 3106 n. 6. Therefore, "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Id.* at 3106-07. Sawyer has failed to overcome that presumption.

We agree with the district court that a state law right to "death-qualified" counsel of five years experience is not included in *Chapman's* "basic to a fair trial" category. Sawyer concedes that the right to a five year attorney is not itself a federal constitutional right. He argues, however, that "the state's arbitrary abrogation of that right may give rise to an equal protection . . . violation." This federal constitutional right, the argument continues, is basic to a fair trial under *Chapman* "in the context of a breakdown in the state-guaranteed trial machinery in a capital case." We do not agree. The alleged constitutional violation in the instant case neither aborted the basic trial process nor denied it altogether, for Sawyer received the effective assistance of counsel.¹⁰ "The thrust of the many

¹⁰ The Court in *Rose* placed a great deal of emphasis on the error's potential effect on the factfinding process at trial. *Rose*,

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constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments." *Id.* at 3107. Recognizing that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one," *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436, we conclude that the state trial court's failure to comply with article 512 does not compare with the kind of errors that have been found to automatically require reversal of an otherwise valid conviction. Sawyer's equal protection claim, therefore, was properly subjected to a harmless error analysis by the district court.

Having determined that a harmless error analysis is appropriate in this case, we must turn to the question of whether the state trial court's appointment of counsel with less than five years experience was indeed harmless. An error is harmless where, after reviewing the facts of the case, the evidence adduced at trial, and the impact the constitutional violations had on the trial process, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the

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106 S.Ct. at 3106. Specifically, the Court emphasized the deleterious effect which errors such as judicial bias or denial of counsel might have on the composition of the record. *Id.* at 3107 n. 7. Where the error in question does not affect the record, "[e]valuation of whether the error prejudiced respondent . . . does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence." No such difficult inquiries are required in the instant case. The failure to appoint five year counsel did not affect the composition of the record in such a way as to prevent an appellate court from evaluating the potential harm to Sawyer.

accused beyond a reasonable doubt. *United States v. Hastings*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96 (1983); *Germany v. Estelle*, 639 F.2d 1301, 1303 (5th Cir. March 1981), *cert. denied*, 454 U.S. 850, 102 S.Ct. 290, 70 L.Ed.2d 140 (1981); *Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir.), *cert. denied*, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980). Given the overwhelming evidence of guilt presented at Sawyer's trial, we agree with the district court that the state trial court's error was harmless beyond a reasonable doubt. Sawyer's equal protection claim, therefore, must fail.

Sawyer's due process claim is also meritless. Where there has been a violation of state procedure, the proper inquiry "is to determine whether there has been a constitutional infraction of the defendant's due process rights which would render the trial as a whole 'fundamentally unfair.'" *Manning v. Warden, Louisiana State Penitentiary*, 786 F.2d 710, 711-12 (5th Cir.1986) (quoting *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. Unit A April 1981)). In order to show that his trial was fundamentally unfair, Sawyer must demonstrate that some prejudice resulted from the state trial court's failure to appoint counsel with five years experience. *See Manning*, 786 F.2d at 712. As we explained earlier, Sawyer has failed to demonstrate prejudice and, therefore, his claim must fail.¹¹

¹¹ In the instant case, the district court applied a harmless error analysis to Sawyer's due process claims and found that any alleged violation was in fact harmless. We have found that there was no due process violation, since Sawyer's trial was not rendered fundamentally unfair by the state trial court's failure to appoint death-qualified counsel. Therefore we need

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C. Caldwell Violation¹²

Finally, Sawyer maintains that certain remarks by the prosecutor in closing argument at the punishment stage of his trial violate the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and require that his sentencing process be redone.

Caldwell is a rule of narrow application. It applies only to comments that mislead a jury in the capital sentencing process by inducing it to feel less responsible than it should for the sentencing decision. *Darden v. Wainwright*, 477 U.S. 168, 183-84 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144, 159 n. 15. The rule is well illustrated by the case in which it was laid down.

In *Caldwell*, the defendant had murdered the female proprietor of a small, rural bait and grocery store in the course of a robbery. Defense counsel, unable to find much comfort in relevant fact or law, took refuge in rhetoric, dwelling at some length on the Sixth Commandment, the Savior, the Crucifixion, mercy, forgiveness and certain of

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not decide whether the district court's analysis was appropriate. We note that there are certain conceptual difficulties inherent in applying a *Chapman* analysis to a due process claim for, if the violation of state law rendered the trial fundamentally unfair, it would seem that the violation could never be harmless. Because we find no due process violation in the case at bar, however, we see no need to reconcile the conceptual difficulties, or to determine whether harmless error analysis can ever be appropriately applied to a due process claim.

¹² The remainder of the opinion and the result represent the views of the panel majority, Judges Gee and Davis. The views of Judge King are set forth in her appended dissent.

the less desirable aspects of being electrocuted. In response, the prosecuting attorney attacked the defense for cynically heaping undue responsibility upon the jury, while the judge concurred – overruling an objection to the argument and directing its continuance:

ASSISTANT DISTRICT ATTORNEY: Ladies and Gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know – they know that *your decision is not the final decision*. My god, how unfair can you be? *Your job is reviewable. They know it.* Yet the . . .

COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

THE COURT: Alright, *go on and make the full expression so the jury will not be confused*. I think it proper that the jury realizes that it is *reviewable automatically* as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, *insinuating that your decision is the final decision* and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and *as Judge Baker has told you*, that the decision you render is *automatically reviewable* by the Supreme Court.

Automatically, and I think it's unfair and I don't mind telling them so.

Caldwell, 472 U.S. at 325-26, 105 S.Ct. at 2637-38 (emphasis added).

The Supreme Court, speaking through Justice Marshall – whose consistent view has long been that capital punishment is forbidden by the Constitution in any case whatever – declared this capital sentence unenforceable because it was imposed by a jury that had been misled by the judge and prosecutor about its critical and central role in the sentencing procedure. Concluding that the prosecutor's comments rendered the sentencing proceeding fundamentally unfair, a divided court required resentencing.

A considerable extension of *Caldwell* would be required to accommodate Sawyer's contentions. In our view, a most critical factor in *Caldwell* was the trial judge's approval and encouragement of the prosecutor's tendentious response to defense counsel's spread-eagled oratory.¹³ As our Brethren of the Eleventh Circuit have observed:

Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus . . . mandating reversal.

¹³ No criticism is implied; counsel had few, if any, other courses open to him and did what he could for his client with his back to the wall.

Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir.1986) (en banc), cert. denied, ___ U.S. ___, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987).

The Supreme Court took a similar view of the passage, observing that the judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct." *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. The comparable proceedings here, while falling short of perfection as do most actual trials, are a far cry from those in *Caldwell*. The respect in which they approach it most closely is in the remarks of the prosecutor; in all other respects of significance, they resemble if not at all. We do not condone the remarks in question and we shall discuss them in a moment. Before doing so, however, we think it appropriate to attempt to put the rule of *Caldwell* into a broader context and to sketch out a general approach for dealing with alleged breaches of it.

A general survey of the authorities indicates, as common sense supports, that the *Caldwell* problem results from prosecutorial attempts to counter a particular set of last-resort arguments by the defense in capital cases. Given that in most such cases verdicts must be unanimous, it necessarily follows that, when all else seems lost, counsel may seek to persuade at least one juror (if no more) that: he or she is being asked to "kill" the defendant, that killing is always wrong, that even evidence that seems absolutely conclusive is sometimes not, that at its best human judgment is fallible, that if the defendant is

erroneously executed no correction of the error is possible, and that at all events mercy is better than retribution. Taken together, these are formidable arguments, arguments that can be made in any case whatever, arguments all of which are in varying degrees true. One response which they sometimes evoke from the prosecutor is an exhortation to the jury to view its responsibility as a joint, rather than an individual, one; and several varieties of that response were made in this case, two permissible, one dubious.

The first called on the jury to view itself as the representative of the citizenry, as "we the people," declaring by its verdict that the acts of the defendant in torturing his victim to death were intolerable and should call down upon him the full force of the law. Another such argument appealed to their group spirit as jurors, assuring them that they did not stand alone in whatever they did but rather functioned together as an institution:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so.

So far, so good; fair argument.

The next sentence, however, embarks upon a far different and more dubious sort of "joint responsibility" argument, one that vaguely and generally reassures the jury that "if you are wrong in your decision, believe me, there will be others who will be behind you to either agree with you or to say you are wrong. . . ." Who these "others" were, the jury was not told. In addition, at various points in the argument the prosecutor improperly

referred to the jury's verdict as a "recommendation," and at another as "only the initial step." No objection was made by the defense at any of the foregoing points.

Following them, however, defense counsel advised the jury in his closing argument that:

The decision whether Robert Sawyer lives or dies is in your hands. . . .

I personally do not agree with the death penalty. I don't think there is any circumstance when anyone has the right to kill another person no matter how we try to get away from it. That is what we would be doing is killing another person. . . . I'm going to ask you to give Robert Sawyer the living death of life imprisonment. Don't kill. Thank you.

After the prosecutor's closing argument, in which he advised the jury that it really had no choice but to recommend the death penalty, "no matter how unpleasant or how difficult this type of decision may be for you to make," the judge charged the jury in standard form, directing them to the evidence as the basis for their decision, describing their forthcoming verdict in one place as a recommendation of sentence and at the other as the imposition of one, and concluding:

It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or life imprisonment. Go with Mr. Miller back in the jury room.

So much for the circumstances of how the jury was advised. We turn now to the law.

The vice in the argument against which *Caldwell's* rule is directed is not so much that it minimizes the jury's

role in the capital sentencing procedure as that it minimizes it untruthfully.¹⁴ It is all too likely that a lay juror who has been told that panel after panel of judges – right up through the Supreme Court – will automatically “review” his verdict may believe that they “review” it as he decided it, in a plenary fashion. Were he told that the “review” would not at all directly concern itself with the central issue before him, life or death for the accused, he would necessarily feel far less reassurance at the prospect. Where, however, a reading of the record makes clear that the jury was told that the life-or-death decision was up to them and that execution could not be exacted without their permission, we think that *Caldwell* is satisfied.

We think it plain that this was the case as to Sawyer. Both the prosecution and the defense, as well as the trial judge, advised Sawyer’s jury that if it chose life imprisonment as its verdict, that was the end of the matter. The defense implored them to do so, and the prosecution – despite various ambiguous statements indicated above – told them it was up to them: “The decision is in your hands.”

In the last analysis, the fundamental question, in this as in other habeas cases involving prosecutorial remarks complained of, is whether the petitioner has demonstrated that the remarks “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden*, 477 U.S. at 181, 106 S.Ct. at 2472, 91

¹⁴ See Justice O’Connor, concurring partly and separately in *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

L.Ed.2d at 157 (quoting from *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). In a *Caldwell* situation, however, we agree with our Brethren of the Eleventh Circuit that because the prosecutor’s remarks typically amount to a mis-instruction to the jury on the legal effect of their verdict, the reaction to them of defense counsel and trial judge are of especial importance:

Of critical importance in *Caldwell* was the fact that the trial judge approved of the prosecutor’s comments, stating that it was proper that the jury be told that its decision was automatically reviewable. See *id.*; *Caldwell v. Mississippi*, 472 U.S. at 325-26, 105 S.Ct. at 2638. Because of the trial judge’s agreement with the prosecutor’s comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus triggering the Eighth Amendment’s heightened requirement of reliability in a capital case and mandating reversal.²

² The Court in *Caldwell* noted that in *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the trial judge took special pains to correct the prosecutor’s impropriety, giving the jury a strong curative instruction. In contrast, in *Caldwell*, the trial judge “not only failed to correct the prosecutor’s remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor’s portrayal of the jury’s role was correct.” *Caldwell v. Mississippi*, 472 U.S. at 2645, 105 S.Ct. at 340. *Tucker*, 802 F.2d at 1295.

Indeed, the only instance of reversal for a *Caldwell* violation in our Circuit to which we are cited or which

our researches have located is *Wheat v. Thigpen*, 793 F.2d 621 (1986), in which the trial court approved the making of such an argument over defense counsel's objection:

Again, I say to you, and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after you have made your decision in this case. Others will look at it, and look at your work, and see if you've made the right decision. And I can assure you, Ladies and Gentlemen, that if one finds that you have not, that they will send him back and tell us to try it over, because some one made a mistake.

BY MR. STEGAL: May It Please The Court, I'm gonna object to that again. He's telling this jury to go ahead and do something even if it's wrong, because it's wrong, they're gonna send it back. That's not right. I'm gonna object.

BY THE COURT: I think the argument was allowed – it was opened up on your argument. I'll overrule it.

793 F.2d at 628.

In so stating we do not, of course, intend to say that reversal is never appropriate in the case of a *Caldwell*-type misstatement unless it has been futilely objected to be endorsed as proper or correct by the trial judge. Each case must be evaluated on its own facts and circumstances; and it is not impossible to imagine statements by a prosecutor that, even absent an objection, minimize the jury's role to such a degree as require reversal if left uncorrected. Even in *Caldwell*, however, where the trial court had overruled an objection and in doing it expressly endorsed the prosecutor's minimizing remarks, the Supreme Court emphasized that his remarks were "quite

focused, unambiguous, and strong." 472 U.S. at 340, 105 S.Ct. at 2645. And indeed they were: beginning with two accusations of duplicity on the part of the defense, the argument proceeds through an attack focused on the defense's "insinuating" that the jury's decision was final, invokes the trial judge's already expressed approval of its somewhat misleading statements, and winds up by assuring the jurors that the decision is "automatically reviewable by the Supreme Court." By contrast, the prosecutor's vague references in today case to "others who will be behind you and the like pale into relative insignificance.

The prosecutor in today's case indulged in no claim that the defense was disingenuously or cynically attempting to mislead the jury, as did his comparable figure in *Caldwell*. Nor did counsel raise any objection, futile or otherwise, to any of the prosecutor's remarks to which Sawyer now takes exception; and the trial court neither approved nor endorsed them. By contrast to the prosecutor's statements in *Caldwell*, which were quite focused, unambiguous and strong – trumpeting automatic review by the Supreme Court and accusing the defense of deliberately misleading the jury as to its role – these were vague and ambiguous. And although we agree with the federal district court that the prosecutor's remarks complained of were improper, we also agree that they did not constitute reversible error – error that so infected the trial as to deny due process.¹⁵

¹⁵ The dissent in *Tucker* argued for a "no effect" standard for reversal, based on a concluding phrase at 472 U.S. at 341, 105 S.Ct. at 2646 in the *Caldwell* majority opinion, "Because we

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IV.

For the foregoing reasons, we AFFIRM.

KING, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's conclusion that the prosecutor's undeniably improper remarks about the finality of the death penalty determination did not violate the eighth amendment as interpreted and applied by the Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). I have several

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cannot say that this effort [to minimize the jury's sense of responsibility] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the eighth amendment requires." 802 F.2d at 1298.

There is no gainsaying that the phrase appears in *Caldwell*, or that it can be read as Judge Kravitch and her two companions in dissent would read it. For a variety of reasons, however, we are not persuaded that the Court intended to impose such a well-nigh impossible burden upon the State as one to show, on pain of reversal, that any remark by a prosecutor in argument that might have a tendency to minimize the jury's sense of responsibility in a capital case had "no effect" on its sentencing decision. Such a test, for example, would make objecting a doubtful tactic, for an objection might bring a correcting instruction or one to disregard, thus removing the remark as a valid ground for appeal. Nor do we see how such a "no effect" test can lie in bed with the requirement, reiterated after *Caldwell* in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2472, 91 L.Ed.2d 144, 157 (1986), that to obtain habeas relief on the basis of improper remarks by the prosecutor, petitioner must show that they so infected the trial as to deny due process.

major concerns with the majority's analysis. First, by applying the fundamental fairness test of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), instead of the "no effect" test of *Caldwell*, the majority has reviewed the prosecutor's comments in this case under the wrong standard. Second, by holding that "a most critical factor in *Caldwell* was the trial judge's approval" of the prosecutor's remarks, the majority has adopted an artificially narrow and incorrect interpretation of *Caldwell* – an interpretation which effectively eviscerates the holding in that case. Third, the majority has also mischaracterized the prosecutor's comments here in order to force them outside the ambit of *Caldwell*. And finally, the majority has erroneously implied that other remarks by the trial court, prosecutor and defense counsel were sufficient to cure the comments of any constitutional impropriety.

The Prosecutor's Argument

The majority opinion gives the facts of the alleged *Caldwell* violation short shrift. But I think it is important to understand exactly what the prosecutor said here. The comments at issue were made by the prosecutor in his closing argument at the sentencing phase of Sawyer's capital trial. The prosecutor, in describing the jury's role, remarked:

The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people*

as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct *are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).*

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions (emphasis supplied).

Caldwell, Donnelly and Darden

In *Caldwell*, the Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29, 105 S.Ct. at 2639. The Court noted that the capital sentencing scheme is premised on a "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' [which allows the] Court to view sentencer discretion as consistent with – and indeed as indispensable to – the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' " *Id.* at 330, 105 S.Ct. at 2640 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)). The Court went on to specify a number of "specific reasons to fear substantial unreliability as well as bias in favor of death sentences

when there are state induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640.¹ Turning to the facts before it, the Court concluded that the prosecutor's comments sought to give the jury a view of its role in the capital sentencing procedure that

¹ Initially, the Court recognized that "[b]ias against the defendant clearly stems from the institutional limits on what an appellate court can do – limits that jurors often might not understand." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 240. The Court also noted that "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. this desire might make the jury very receptive to the prosecutor's assurance that it can freely 'err because the error may be corrected on appeal.' " *Id.* at 331, 105 S.Ct. at 2641 (quoting *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983)). A defendant could be executed, therefore, although no sentencer had ever made a determination that death was the appropriate sentence. The Court also raised the possibility that the jury, assuming that only a death sentence will be reviewed, might "understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence." *Caldwell*, 472 U.S. at 332, 105 S.Ct. at 2641. the sentence that would emerge from such a proceeding would not represent a decision that the appropriateness of the defendant's death had been demonstrated; rather, the decision would present "the specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns" – namely the desire to avoid responsibility for the decision. *Id.* Finally, given the fact that a capital sentencing jury is "made up of individuals placed in a very unfamiliar situation and called on to make a difficult and uncomfortable choice," an uncorrected suggestion that the ultimate determination of death rests elsewhere presents "an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 105 S.Ct. at 2642.

was fundamentally incompatible with the eighth amendment's heightened need for reliability. *Id.* at 340, 105 S.Ct. at 2645. As the Court "[could not] say that [the State's] effort had no effect on the sentencing decision," it was compelled to vacate the death sentence. *Id.* at 341, 105 S.Ct. at 2646.

In reaching its conclusion, the Court was careful to distinguish, on two separate grounds, the fourteenth amendment fundamental fairness inquiry of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), from the case before it. First, the trial judge in *Donnelly* had agreed that the prosecutor's remarks in that case were improper and had given the jury a strong curative instruction. By contrast, in *Caldwell*, the trial judge not only failed to correct the prosecutor's remarks, but in fact openly agreed with them. *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. Second, the prosecutor's remarks in *Donnelly* were ambiguous and did not so prejudice a specific constitutional right as to amount to a denial of that right. The remarks in *Caldwell*, in contrast, "were quite focused, unambiguous, and strong" and "were pointedly directed at the issue that [the] Court has described as 'the principal concern' of [its] jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence." *Id.* at 340, 105 S.Ct. at 2645 (citation omitted).

The Court subsequently clarified the reach of *Caldwell* and *Donnelly* in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In *Darden*, the Court was confronted by a variety of challenges to the prosecutor's closing argument at the guilt phase of a capital murder trial. The Court relied on *Donnelly* in treating the

relevant question as "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly*, 416 U.S. at 643, 94 S.Ct. at 1871). The *Darden* majority was quite careful, however, to distinguish the facts in front of it from those in *Caldwell*.² The *Darden* Court specifically limited *Caldwell* "to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 106 S.Ct. at 2473 n. 15. As the prosecutor's comments in *Darden* did not mislead the jury as to its role in the sentencing decision, *Caldwell* was inapplicable.

Standard of Review

I differ with the majority on the appropriate standard by which to review the comments at issue here. The majority, relying on *Darden* and *Donnelly*, holds that the

² In *Darden*, the Court wrote that:

There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence.

Darden, 106 S.Ct. at 2473 n. 15.

fundamental question, in this case as in other habeas cases involving improper prosecutorial comments, is whether the petitioner has demonstrated that the remarks rendered the trial fundamentally unfair so as to deny due process.³ A fair reading of *Caldwell* and *Darden* cannot support this conclusion.

³ The genesis of this proposition may be found in the Eleventh Circuit's decision in *Tucker v. Kemp*, 802 F.2d 1293 (11th Cir.1986) (en banc), cert. denied, ___ U.S. ___, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987). In *Tucker*, the court "borrowed" the prejudice prong of *Strickland* in order to apply the *Donnelly* fundamental fairness standard to *Caldwell*-type violations. See *Tucker*, 802 F.2d at 1295. That decision was roundly criticized by three judges in dissent. The dissenting opinion in *Tucker* discussed a number of shortcomings in the Eleventh Circuit's approach. The dissent noted, for example, that *Strickland* and *Caldwell* are fundamentally different in their assignment of the burden of proving prejudice. *Tucker*, 802 F.2d at 1298 (dissenting opinion). Unlike *Strickland*, *Caldwell* places the prejudice burden on the State. "Once the petitioner has shown that the prosecution attempted to minimize the jury's responsibility at the capital sentencing hearing, the state must show that 'this effort had no effect on the sentencing decision.'" *Id.* (quoting *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646). The dissent also stressed that while "the government is not responsible for, and hence not able to prevent, [defense] attorney errors that will result in reversal," see *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067, "the state can control prosecutorial conduct and, in the capital sentencing context, is constitutionally obligated to do so." *Tucker*, 802 F.2d at 1298 (dissenting opinion). Finally, the dissent found it significant that the Supreme Court itself "did not apply its *Strickland* prejudice analysis to *Caldwell*'s claim of prosecutorial misconduct at sentencing but instead reaffirmed the long line of cases requiring heightened reliability in capital sentencing proceedings." *Id.*

In *Caldwell*, the Court wrote: "Because we cannot say that this effort [to minimize the jury's sense of responsibility for determining the appropriateness of death] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341, 105 S.Ct. at 2646. The majority, while recognizing that the phrase exists and that the "no effect" test is a plausible interpretation of the Court's language, concludes, for a variety of reasons, that the Court could not have meant to place a higher burden on the State in an eighth amendment *Caldwell*-type situation than would otherwise be borne under the due process jurisprudence of *Donnelly* and its progeny. I find the majority's reasoning unpersuasive.

The majority argues that the adoption of the "no effect" test would impose a "well-nigh impossible burden upon the state." According to the majority, the State would be forced to show that *any* remark which tended to minimize the jury's sense of responsibility in a capital case had no effect on the sentencing decision. That is not so. In order to qualify as a *Caldwell* violation, the prosecutor's remarks concerning the jury's role must be "focused, unambiguous and strong." *Id.* at 340, 105 S.Ct. at 2645. Moreover, the remarks would typically be made at the sentencing phase of trial rather than during voir dire, see *Byrne v. Butler*, 845 F.2d 501, 509 (5th Cir. 1988), or during the guilt-innocence stage, see *Darden*, 106 S.Ct. at 2473 n. 15. Finally, the remarks must not be corrected by an appropriate instruction from the trial court. *Caldwell*'s "no effect" test, therefore, is limited to a subset of particularly forceful prosecutorial comments on a narrow topic, generally presented to a capital jury at the sentencing

phase of trial, which are not corrected by the trial court. So, while the burden on the State may in fact be "well-nigh impossible," it is borne only in a narrow class of cases.

The majority also argues that the "no effect" test cannot be squared with *Darden*'s reaffirmation of the *Donnelly* test in *most* cases involving improper remarks by a prosecutor. The principles of *Caldwell*, however, were not applicable in *Darden*. *Darden*, 106 S.Ct. at 2473 n. 15. Since the prosecutor's comments in *Darden* could not have misled the jury into thinking that it had a reduced role in the sentencing process, any eighth amendment argument was unconvincing and the Court felt free to apply the more generally applicable due process standard of review. *Darden* did not hold that the *Donnelly* standard should be applied to *Caldwell* violations. If it had, the Court would not have needed to go to such great lengths to distinguish *Caldwell*.⁴ See *id.* It is clear, therefore, that in the peculiar eighth amendment context of the *Caldwell* violation a stricter standard of review applies.⁵

⁴ By reviewing Justice Blackmun's dissenting opinion in *Darden*, which was joined by three of the other four members of the *Caldwell* majority, the error in the majority's analysis can be readily discerned. In *Darden*, the dissent charged that the Court rejected "the 'no effect' test set out in *Caldwell*" without identifying which standard it was using. *Darden*, 106 S.Ct. at 2480 (Blackmun, J., dissenting). The Court responded to the dissent's charges by distinguishing *Caldwell* so that it could apply the *Donnelly* standard to the facts before it. At no point, however, did the Court take issue with the dissent's characterization of the *Caldwell* standard as a "no effect" test.

⁵ Justice Rehnquist, in his dissenting opinion in *Caldwell*, clearly believed that the Court had rejected the *Donnelly*

Prosecutorial comments which truly qualify as *Caldwell* violations cannot be reviewed under the *Donnelly* standard.⁶

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standard. Justice Rehnquist "[found] unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the [prosecutor's] statements," and concluded that "[a]lthough the Eighth Amendment requires certain processes designed to prevent the arbitrary imposition of capital punishment, it does not follow that every proceeding that strays from the optimum is *ipso facto* constitutionally unreliable." *Caldwell*, 472 U.S. at 350-51, 105 S.Ct. at 2650-51 (Rehnquist, J., dissenting). Justice Rehnquist chided the Court for not heeding the directives of *Donnelly* and for not applying a fundamental fairness test. *Id.*

⁶ The panel's discussion of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), underscores the error in the majority's adoption of a fundamental fairness standard in this case. In *Chapman*, the Court recognized that some errors necessarily render a trial fundamentally unfair. *Rose*, 106 S.Ct. at 3106. There are certain constitutional protections so basic to a fair trial that without them, a criminal proceeding cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and the criminal sanction may not be regarded as fundamentally fair. *Id.* Such errors either abort the basic trial process or deny it altogether. *Id.* at n. 6. The *Caldwell* violation presents a clear example of a breakdown in the trial process. The pernicious effects of focused, unambiguous and strong prosecutorial remarks concerning the jury's role in the sentencing process and the inevitability of appellate review are impossible to measure. Consequently, where such remarks are left uncorrected by the trial court, there is an intolerable danger that they affected the sentencing decision. For all the reasons reviewed by the Court in *Caldwell*, such remarks create an unacceptable risk of systemic breakdown, thereby poisoning the reliability of the death sentence.

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Nature of a Caldwell Violation

I also differ with the majority's description of the nature of what has come to be called a *Caldwell* violation. Not content with *Darden's* express limitation of *Caldwell* to a particular type of prosecutorial comment at the sentencing phase of trial, the majority would further restrict the reach of *Caldwell* to those rare instances in which the trial court expressly approves the prosecutor's improper remarks. Essentially, the majority would make the trial court's imprimatur a prerequisite to finding a *Caldwell* violation. The majority's position is based on a tortured reading of *Caldwell*.

The majority ignores the fact that the Supreme Court framed the *Caldwell* issue throughout the majority opinion solely in terms of the prosecutor's remarks:

In this case, a prosecutor urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court. We granted certiorari . . . to consider petitioner's contention that the prosecutor's argument rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's 'heightened need for reliability. . . .'

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Given that the eighth amendment demands a heightened degree of reliability in any case where the State seeks to take the life of a defendant, the prosecutor's remarks necessarily rendered the proceedings fundamentally unfair. It is our inability to measure the effect of such remarks, combined with the very grave threat to the integrity of the proceedings posed by such remarks, that militates in favor of the "no effect" test.

Caldwell, 472 U.S. at 323, 105 S.Ct. at 2636 (emphasis supplied). The majority opinion in *Caldwell* is divided into approximately thirteen parts and subparts, and the only mention of the trial court's endorsement of the prosecutor's remarks is in Part IV-C of the opinion in which the court sought to distinguish *Donnelly*. While the court did note that the trial judge had approved the remarks in the case before it, it did not establish that fact as a prerequisite to its ultimate condemnation of the prosecutor's actions. Rather, the Court identified *two* important factors which distinguished *Donnelly*. First, the Court looked at the trial court's actions and found that, unlike in *Donnelly*, the trial court not only failed to correct the improper remarks, it also endorsed them. *Id.* at 339, 105 S.Ct. at 2645. Next, the Court looked to the character of the remarks and determined that the prosecutor's comments differed from those in *Donnelly* because they were "focused, unambiguous, and strong" and because they prejudiced a specific constitutional right, i.e., an eighth amendment right, *Id.* at 340-41, 105 S.Ct. at 2645-46. The Court went on to confirm that such comments, *if left uncorrected*, might so affect the fundamental fairness of the sentencing proceeding as to violate the eighth amendment. *Id.*

Given *Caldwell*'s overwhelming emphasis on the character and effect of the prosecutor's argument itself,⁷ the

⁷ Justice O'Connor, in her concurring opinion, noted that "the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Id.* at 342, 105 S.Ct. at 2646 (O'Connor, J., concurring). Justice O'Connor's concurring

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question of whether the trial court endorsed the comments must be viewed as merely a factor in a larger inquiry. A proper inquiry must focus on the nature of the prosecutor's remarks themselves *and* on the character of the trial court's response to those remarks. Moreover, an evaluation of the trial court's response is not limited to the question of whether the trial court endorsed the remarks. Were this not the case, the Court's references to curative action would be superfluous for silence would be sufficient medicine for what ailed the proceedings. I do not think *Caldwell* can fairly be read, therefore, as holding that the trial court's endorsement of the prosecutor's remarks is a prerequisite to finding an eighth amendment violation.

Nature of the Prosecutor's Remarks

The majority, casting the prosecutor's remarks in a more favorable light than they merit, weaves the threads of an admittedly "improper" argument into a harmless tapestry of vague, disjointed and forgiveable⁸

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opinion focused exclusively on the prosecutor's remarks, never once mentioning the trial court's endorsement of those remarks.

⁸ The majority also strives to justify the prosecutor's remarks on the ground of practical necessity. Prosecutors need such arguments, the majority suggests, to deal with the "formidable" argument, typically urged as a "last-resort" by struggling defense counsel, that the decision whether the defendant merits execution rests with each individual juror, that human judgment is not infallible, that mistakes can be made and that death is one error which cannot be corrected. The majority

(Continued on following page)

prosecutorial comments. My own review of the record has led me to conclude that the prosecutor's remarks in the instant case are sufficiently similar to those found constitutionally wanting in *Caldwell* as to merit vacation of Sawyer's sentence.

In the instant case, the prosecutor told the jury:

Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you

(Continued from previous page)

points out, as it must, that such arguments are "in varying degrees" true. Those weighty factors, however, are precisely the sort of considerations which society has entrusted the jury to weigh in reaching its decision. Those decisions are at the core of the heightened need for reliability demanded by the eighth amendment of sentencing proceedings in capital trials.

The prosecutor is free to emphasize the collective nature of the jury decision. He is also free to emphasize that the defendant himself bears the responsibility for the consequences of his actions. The prosecutor most certainly made those arguments in this case. The prosecutor is not free, however, to diminish the jury's sense of the finality of their decision by repeatedly alluding to the specter of appellate review. By doing so, the prosecutor may well leave the jurors with the notion that their moral judgment in favor of death will be reviewed for error. See *Caldwell*, 472 U.S. at 340 n.7, 105 S.Ct. at 2645 n. 7. This may hold true even when the prosecutor has stressed that "the decision" is in the jury's hands for "the decision" in that case would be the decision to send a message, or the decision to start the ball rolling, or the decision that the jury wants the case reviewed. See *id.* at 330-33, 105 S.Ct. at 2640-41. It would not be the decision demanded by society and required by the eighth amendment: that the defendant merits execution because death is the appropriate punishment for the crime he has committed.

are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong. . . .

While the majority is arguably correct in dismissing the first portion of this comment as a permissible "joint-responsibility" argument, it is remiss in not recognizing the answer to the query it asks with respect to the latter portion: who are the "others" who will be behind the jury to agree with their decision or correct them if they are wrong? The answer is suggested in an earlier comment by the prosecutor:

. . . what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body . . . are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty.

Just as the *Caldwell* prosecutor referred to the ultimate reviewability of the jury's determination, so too did the prosecutor here make several unambiguous allusions to the inevitability of appellate scrutiny, naming the potential reviewers as he did so. As if the intended suggestion was not already clear enough, the prosecutor went on to hammer home his point by explicitly referring to judicial review and by couching his description of the jury's decision in language bespeaking possibility rather than finality:

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day. . . . All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.

The contested remarks here are precisely the sort of comments condemned in *Caldwell* as tending to impart to the jury a view of its role in the capital sentencing procedure that is fundamentally incompatible with the eighth amendment's heightened need for reliability in the death sentence determination. It is unnecessary to decide whether any one remark violated *Caldwell* for it is readily apparent that the prosecutor's repeated references to appellate review and the jury's limited role in the death sentence calculus surely did so. When viewed in their totality, the remarks appear "focused, unambiguous, and strong." See *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645. The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind" them would be there to correct any error in that determination. The message of non-finality was clear.

The Trial Court's Response

Having determined that the prosecutor's remarks were inappropriate under *Caldwell*, a question remains whether subsequent action by the trial court was sufficient to preclude reversal. See *Caldwell*, 472 U.S. at 339-40, 105 S.Ct. at 2645; see also *Bell v. Lynaugh*, 828 F.2d 1085 (5th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 310, 98

L.Ed.2d 268 (1987). The majority notes that the trial court delivered a standard form jury instruction informing the jury that it was their responsibility to deliver a sentence of death or life imprisonment. While that much is true, it is equally clear that the trial court did little if anything to correct the damage that was done. This is particularly so with respect to the prosecutor's comments regarding appellate review. Even if the trial court's instructions left the jury with the view that they had an important role to play, they did nothing to undermine the prosecutor's suggestion that the jury's determination would be reviewed by an appellate court to assure its correctness. See *Caldwell*, 472 U.S. at 340 n. 7, 105 S.Ct. at 2645 n. 7.

This is not a case where the trial court admonished the jury to disregard the prosecutor's comments. Nor is this a case where the trial court meticulously instructed the jury on the errors in the prosecutor's argument. I do not presume to establish a general standard by which to judge the efficacy of a trial court's curative instructions in a *Caldwell* violation context. I merely note that in the instant case, the trial court's instructions⁹ were

⁹ The majority, in an effort to bolster its position that the prosecutor's remarks were later "cured", points to the fact that defense counsel informed the jury that "[t]he decision whether Robert Sawyer lives or dies is in your hands." That remark was patently insufficient to relieve the jurors of any mistaken impressions they might have held as to their role in the death penalty determination. In fact, any initial confusion by the jury might well have been exacerbated by defense counsel's espousal of a position contrary to that which the prosecutor seemed to embrace. The jury may have understood the remark, made just after the prosecutor had finished insinuating that the jury's decision was not final, to signify the existence of a true

insufficient to disabuse the jury of the notion that final responsibility for the sentencing decision might lay elsewhere.

In summary, because I believe that the prosecutor's effort to minimize the jury's sense of responsibility for determining the appropriateness of death cannot be said to have had no effect on the sentencing decision, I believe that the writ must be granted as to the sentence imposed upon Sawyer. I dissent from the majority's decision to affirm the district court's denial of the writ.

ON SUGGESTION FOR
REHEARING EN BANC

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, and SMITH, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

(Continued from previous page)

dispute on the role of the jury. Therefore, defense counsel's remark, when considered along with the prosecutor's earlier comments, may well have added to the cloud of uncertainty billowing around the jury about its own role. Consequently, the majority's reliance on the curative properties of defense counsel's remark is misplaced.

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

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March 30, 1989

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No. 87-3274 - Sawyer v. Butler

(USDC No. CA-86-0223 - "I" (4))

Dear Counsel:

The En Banc court requests that counsel in this case submit additional briefs discussing the relevance of the Supreme Court's recent decision in *Teague v. Lane*, 57 U.S.L.W. 4233 (1989), to Sawyer's petition. The Court wishes to know whether *Teague* precludes Sawyer from raising *Caldwell* issues in a collateral attack on his conviction. Counsel should address the following questions, although they need not limit themselves to these questions:

1. Does *Caldwell* articulate a rule that is new within the meaning of the *Teague* test? In answering this question, please discuss the significance of the Louisiana cases dealing with prosecutorial argument that diminishes the responsibility of a capital jury. See, e.g., *Steve v. Willie*, 410 So.2d 1019 (La. 1982). The Court wishes to know whether these cases rest upon state law rules, or upon the Eighth Amendment to the Constitution, and what effect, if any, they have upon the newness of Sawyer's *Caldwell* claim for *Teague* purposes.

2. Does *Teague* apply to collateral attacks upon a sentencing proceeding in a capital case?

3. Does *Caldwell* announce a rule that falls within the "fundamental fairness" exception to the *Teague* rule?

Sawyer's brief should be filed on or before May 12.
Louisiana's brief should be filed on or before May 19.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

by /s/ Amanda K. Vockroth
Amanda K. Vockroth
Case Manager

AKV/dme

United States Court of Appeals,
Fifth Circuit.

Robert SAWYER, Petitioner-Appellant,

v.

Robert H. BUTLER, Sr., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

No. 87-3274.

Aug. 15, 1989.

Appeal from the United States District Court for the
Eastern District of Louisiana.

Before CLARK, Chief Judge, GEE, REAVLEY, POL-
ITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY,
HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE,
Circuit Judges.¹

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Robert Sawyer was sentenced to death by a Louisiana
jury on September 19, 1980 for the brutal slaying of
Frances Arwood. Today we decide his appeal from the

¹ When this case was orally argued before and considered
by the court, Judge Rubin was in regular active service. He
participated in both the oral argument and the en banc confer-
ence, and with Judge King in the preparation of her dissenting
opinion. He took senior status, however, on July 1, 1989. Based
on his understanding of the Supreme Court decision in *United
States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 80 S.Ct.
1336, 4 L.Ed.2d 1491 (1960), he considers himself ineligible to
participate in the decision of this case, but he adheres to the
views in Judge King's dissent.

denial by a United States District Court of his petition for
writ of habeas corpus. We have elsewhere recorded the
long history of Sawyer's efforts to overturn his convic-
tion.² Sawyer's attack has now boiled down to three
arguments. First, he argues that his court-appointed trial
counsel was ineffective in certain respects. Second, and
closely related to the first, he argues that his conviction
should be set aside because his appointed counsel had
not been licensed for five years as required by La.Code
Crim.P. art. 512. Finally, he argues that the prosecutor in
closing argument misled the jury about its role in capital
sentencing as condemned by *Caldwell v. Mississippi*, 472
U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

A panel of this court rejected Sawyer's contentions,
dividing over the *Caldwell* issue, and we took the case *en
banc*. We reject Sawyer's first two contentions for the
reasons stated by the panel, affirm the district court's
denial of Sawyer's petition for relief from his conviction,
and turn to the difficult question of whether Sawyer is
entitled to a new sentencing hearing because the state
misled the jury about the jury's responsibility in deciding
whether Sawyer should be executed.

Part I summarizes the facts. In Part II we sketch the
constitutional principles that frame our inquiry. We next
in Part III address the statutory overlay to the constitu-
tional issues, as presented by the Supreme Court's recent
decision in *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060, 103
L.Ed.2d 334 (1989). Because we conclude that we cannot
apply *Teague* without first defining the scope of *Caldwell*,

² *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988).

we turn back in Part IV to the substantive constitutional questions. We endorse a version of Sawyer's construction of *Caldwell*. We find in Part V, however, that *Caldwell* so defined is a new rule within the meaning of *Teague*, and that *Caldwell* does not fit within either of *Teague*'s two exceptions. Sawyer's *Caldwell* argument is therefore *Teague*-barred. The prosecutorial argument complained of will thus vitiate Sawyer's death sentence only if Sawyer can prevail under the earlier rule of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). In Part VI we conclude that Sawyer has no *Donnelly* claim. We therefore affirm denial of Sawyer's petition to vacate his sentence.

I

Caldwell addressed constitutional issues that arise when a prosecutor misleads a capital jury about its responsibility for the sentencing decision. The prosecutor's argument creates a possibility that the jury will decide between life and death without an appropriate sense of grave responsibility. Sawyer contends that *Caldwell* mandates a new sentencing trial any time a prosecutor taints the proceeding with a *Caldwell*-type argument, unless the argument had "no effect" upon the jury. Louisiana, however, says that a *Caldwell*-type prosecutorial argument will not generate constitutional grounds for reversal unless the argument rendered the sentencing phase "fundamentally unfair" to the defendant. Louisiana would have us focus upon effective prejudice to the defendant, rather than effective dilution of the jury's sense of responsibility. The case turns upon this disagreement.

Sawyer's *Caldwell* claim arises out of remarks which the prosecutor made in his closing argument during the trial's sentencing phase. The details of the prosecutorial remarks are important to Sawyer's argument. We therefore repeat those remarks here. The prosecutor told the jury,

The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is a type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision buy you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision [emphasis supplied].*

The prosecutor drew the jury's attention to the brutal nature of the crime for which Sawyer stood convicted. The prosecutor then returned to the theme of the jury's responsibility, saying

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your

hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

After arguing that a death penalty was justified in Sawyer's case, the prosecutor struck the theme of jury responsibility again, telling the jury that their mistakes could be corrected by later decision-makers:

It's all your³ doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions (emphasis supplied).

II

The problem of *Caldwell* error touches upon three of the Constitution's grandest themes. Two of these are obvious. The problem implicates federalism, because the

³ This word was likely recorded inaccurately by the stenographer. From context, it is clear that the prosecutor said, "It's all *you're* doing." The two phrases sound identical, but their meanings are nearly opposite.

state asserts a power to decide for itself questions of criminal procedure. *Caldwell* analysis also concerns individual rights, since the defendant contends that diminishing a capital jury's sense of responsibility subjects him to cruel and unusual punishment. The third theme is perhaps less obvious, but no less important to understanding the issues raised by a *Caldwell* claim. *Caldwell* touches the principle of popular self-government, because the direct expression of popular sentiment through juries remains an important aspect of the people's participation in the government, and a crucial check upon the state's authority to define the limits of crime and punishment.

The jury seems always to be at the center of the judicial struggle with the death penalty. This should not be surprising. Differences over the role of the jury reflect differences over the wisdom of the penalty itself. The legislative judgment specifying execution as the punishment appropriate to certain crimes embodies a confidence both about the moral principles of the community and about the capacity of the criminal justice system to resolve factual disputes. Coupled to the confidence must be an equal certitude that the jury will be able to bring the community's principles to bear, and so judge blame and guilt accurately in the individual case.

In *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), Justice Harlan summarized how history had given expression to this deep link between the death penalty and the jury. Justice Harlan explained that legislatures "to meet the problem of jury nullification . . . did not try, as before, to refine further the definition of capital homicides. Instead, they adopted the method of forthrightly granting juries the discretion

which they had been exercising in fact." *Id.* at 199, 91 S.Ct. at 1463. Justice Harlan observed that the Court had earlier concluded that "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary and community values and the penal system – a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." *Id.* at 202, 91 S.Ct. at 1464, *quoting Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 n. 15, 20 L.Ed.2d 776 (1968).

We have long recognized that decisions that depend essentially upon inarticulable judgment and common sense intuition are prime candidates for jury decision. Indeed, we refer to these judgments as "blackbox decisions." The sentencing decision in capital cases is born out of an inherent and unique mixture of anger, judgment and retribution, and requires a determination whether certain acts are so beyond the pale of community standards as to warrant the execution of their author. This decision to punish by death is a paradigmatic "black-box" call. To say that the decision can at best only be guided, not determined, by a judicial instruction or lawyers' argument underscores the decision's irreducible discretionary core.

A commitment to jury resolution of these blackbox decisions reflect a commitment to submit these issues to an active exercise of practical judgment, rather than to the reified precision of legal analysis. But the jury, of course, checks not only legalism but the government more generally. It protects from punishment those defendants who are innocent in the judgment of their peers.

For both these reasons, the right to trial by jury has long been cherished within our legal tradition. Blackstone commended juries as an "admirable criterion of truth, and most important guardian both of public and private liberty." W. Blackstone, 4 *Commentaries* 407. The Constitution expressly secures the right to jury trial. It is, then, neither coincidental nor surprising that the jury's integrity should be so aggressively protected in capital cases, when the stakes are so high.

Of course, the Court has since rejected *McGautha's* teaching that "[t]o identify before the fact those characteristics . . . in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." 402 U.S. at 204, 91 S.Ct. at 1466. The Court has demanded that states guide the jury's discretion. The Court has also permitted states to take some power away from the jury. But the jury's sense of gravity, and the responsible discretion it fosters, remain crucial to post *McGautha* sentencing schemes. *Caldwell* articulates a constitutional protection against state conduct that diminishes the jury's perception of its awesome responsibility.

In this sense, *Caldwell* itself is but the trace of a more comprehensive rule, one that might have trusted jury discretion to protect individual rights and express the scope of state power. The Court's post-*McGautha* jurisprudence has instead sought to secure individual rights by limiting jury discretion, and has deferred to the states' own restrictions upon jury power. The Constitution, after all, permits the people to speak through state law as well

as through juries. Federalism, no less than jury participation, ties local penalties to local sentiment and local judgment.

Nonetheless, it is necessary to perceive the larger theme in order to understand its trace within the composition that remains. *Caldwell* stands in part for the continuing vigor of the ideals articulated by Justice Harlan in *McGautha*. *Caldwell* treats jury discretion within a framework that recognizes both federal and state limits upon the jury's power. But it is the larger whole behind the trace which accounts for *Caldwell's* peculiar nexus to the constitutional mix of individual autonomy, federalism, and populism.

Indeed, this reflection of *McGautha's* ideals in *Caldwell* forms the lynchpin of Sawyer's argument here, and was the fulcrum for the argument that divided our panel. Only if *Caldwell* harkens back to the high esteem which *McGautha* accorded jury discretion can *Caldwell* impose, as Sayer would have it, considerably more stringent restrictions than its Due Process Clause precursor, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). *Donnelly* subjected prosecutorial argument to a generalized "fundamental fairness" standard, which would benefit Sawyer only were he able to show actual prejudice from the argument complained of. Sawyer's principal argument presupposes that the Eighth Amendment, as interpreted by *Caldwell*, puts a particular premium upon responsible jury discretion in a proceeding that fixes punishment at life or death. It is that premium which would, on Sawyer's argument, distinguish *Caldwell* from *Donnelly*. The existence of that premium in turn assumes that a jury's deliberation may be even more

crucial at the punishment phase than it is in choosing between guilt and innocence. That assumption makes sense only if, as Justice Harlan argued in *McGautha*, the jury's capacity to express moral sentiment directly is peculiarly essential to questions of capital blameworthiness.

Because Sawyer's claim comes before us by way of a habeas petition, not by direct appeal, we view the delicate constitutional mix through a similarly complex statutory overlay. The law of the habeas writ balances the vindication of constitutional rights against the state's constitutionally legitimate interest in maintaining a criminal justice system capable of producing final convictions. The Supreme Court refined anew this balance in *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Teague's* rule precludes habeas petitioners from seeking to overturn their convictions on the basis of rules new by comparison with the date their convictions became final. This statutory balance provides, however, exceptions for constitutional claims of a certain character. It may therefore wrap back around the constitutional issues, and so, in Sawyer's case, back around the questions about jury responsibility in capital cases. Yet a plurality, at least, of the *Teague* Court regarded the *Teague* retroactively inquiry as a preemptive threshold to constitutional analysis. 109 S.Ct. at 1069. *Accord*, *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 2944, ___ L.Ed.2d ___ (1989) (applying *Teague* as threshold barrier to constitutional analysis). Because *Teague* may present a threshold barrier to fuller consideration of Sawyer's constitutional claims, we begin our analysis with that case.

III

The Supreme Court did not decide *Teague* until after the *en banc* court heard oral argument in this case. At our request the parties have filed briefs regarding *Teague*'s applicability to Sawyer's petition.

Teague adopts much of what Justice Harlan long advocated as the correct view of federal habeas. Under *Teague* a federal habeas petitioner attacking a final state conviction may rely only upon the law in effect when his conviction became final. There are two exceptions. First, the petitioner may rely upon a new rule if it would place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.*, 109 S.Ct. at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and dissenting in part)). The Court has since declared that this first exception also applies to rules which exempt certain persons entirely from capital punishment. *Penry*, 109 S.Ct. at 2955. Second, the petitioner may rely on a new rule requiring the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty'" *Teague*, 109 S.Ct. at 1073, quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (opinion of Harlan, J.) (inside quote from *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.)).

A majority of the *Teague* court fully subscribed to this restriction on the use of federal habeas to attack final state court convictions. *Teague* left much of the restriction's content in doubt, although some of that ambiguity was removed by the Court's later decision in *Penry v.*

Lynnaugh, 109 S.Ct. 2934, 2944 (opinion of O'Connor, J., for the Court). In *Teague* itself, four justices concluded, in an opinion by Justice O'Connor, that the second proviso, drawn from Cardozo's incorporation formulation, should be modified to limit its scope "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." 109 S.Ct. at 1076-77. The remaining justices filed four separate opinions: Justice White concurred separately, as did Justice Stevens; Justice Blackmun joined part of Justice Stevens's opinion, and added a brief writing of his own; and Justices Brennan and Marshall dissented.

Teague was not a capital case, and the plurality disclaimed any decision regarding its application to an effort by a state prisoner to overturn his death sentence. Justice Stevens joined Justice O'Connor's opinion insofar as it adopted Justice Harlan's restrictions on federal habeas. He dissented, however, from the plurality's insistence that "the only procedural errors deserving correction on collateral review are those that undermine 'an accurate determination of innocence or guilt'. . . ." *Id.* at 1081. He suggested that "a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings." *Id.* Justice Stevens noted that Justice Harlan's interest in making convictions final was "an interest that is wholly inapplicable to the capital sentencing context." *Id.* at 1081 n. 3. Justice O'Connor's plurality opinion replied that because *Teague* was not himself under a death sentence, the Court need not express any opinion "as to how the retroactivity approach we adopt today is to be applied in the capital sentencing

context. We do, however, disagree with Justice Stevens's suggestion. . . . As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant." *Id.* at 1077 n. 3.⁴

Note three did not gain majority support, since Justice White neither joined it nor otherwise mentioned *Teague's* application to death cases. Justice Brennan's dissenting opinion, joined by Justice Marshall, assumes that the plurality would apply the new limits to death cases, and observes that "the plurality's new rule apparently would not prevent capital defendants . . . from raising Eighth Amendment, due process, and equal protection challenges to capital sentencing procedures on habeas corpus." *Id.* at 1089 n. 5.

The *Penry* decision settled *Teague's* application to death cases. In Part II-A of her opinion for a fractured Court, Justice O'Connor, joined by the Chief Justice and Justices White, Scalia, and Kennedy, held that *Teague* did apply to capital cases. The plurality simply observed that the finality concerns underlying the *Teague* doctrine hold equally well in capital cases, and offered no further analysis. The four remaining Justices dissented from the relevant portion of Justice O'Connor's opinion.

It remains unclear, however, whether *Teague* necessarily operates as a threshold barrier preempting full analysis of the constitutional claims asserted. The *Teague* plurality clearly thought that a *Teague* bar would preempt discussion of the constitutional merits. 109 S.Ct. at

⁴ Justice Blackmun joined Justice Stevens's reservations about *Teague's* applicability to death cases.

1069-70, 1077. However, Justices Stevens and Blackmun, who joined the plurality to constitute a majority in favor of Justice Harlan's approach to retroactivity, expressly rejected the plurality's position on this matter. Justice Stevens, joined by Justice Blackmun, contended that the Court should proceed by "first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief." Justice Stevens went on to observe that, absent a precise formulation of the rule in question, it may be difficult to determine whether the rule is in fact "new" at all. *Id.* at 1079-80 & n. 2. Finally, Justice White once again declined to join the relevant portion of the plurality opinion, leaving unclear his own position on the relation between the constitutional and *Teague* issues.

On this point, *Penry* leaves the matter unclear. A majority did join a portion of Justice O'Connor's opinion which characterized *Teague* as a rule to be applied "as a threshold matter," 109 S.Ct. at 2944 (Part II-A). Indeed, in Part IV-A all nine Justices joined a portion of the opinion which included a reference to *Teague* as a threshold test. *Id.* at 2952. We must take care, however, not to overstate the significance of these votes. Thus, although Justice Stevens joined Part IV-A of Justice O'Connor's opinion, he reiterated in a separate concurrence his view that the constitutional rule should be articulated before *Teague* is applied. The threshold character of the *Teague* bar was not the primary topic of Part II-A or Part IV-A, and it would be unwise to assume that each Justice joining those parts intended that *Teague* function as a threshold barrier in every case where it applied.

More importantly, however, Justice O'Connor's own opinion mixed the *Teague* inquiry with the constitutional questions. In order to decide that Penry's requested rule was dictated by precedent, and so not new, she had to decide precisely the substantive question which divided the Justices five-to-four over Part III of her opinion: that is, the question of whether Penry's proposed rule was the best possible interpretation – let alone the interpretation "dictated by" – Supreme Court precedent. 109 S.Ct. at 2944-46 (Part II-B). Likewise, Justice Scalia, dissenting in part and joined by the Chief Justice, Justice White and Justice Kennedy, observed that "[t]he merits of the mitigation issue, and the question of whether, in raising it on habeas, petitioner seeks application of a 'new rule' within the meaning of *Teague*, are obviously interrelated." 109 S.Ct. at 2964.

The relationships that led to a mixing of the *Teague* issues and the constitutional issues in *Penry* become all the more powerful when a petitioner attempts not to establish a new rule, but to rely, as Sawyer would like to, upon a rule that is new by comparison to his own conviction yet is well established by the time of his habeas petition. In such a case, a court may have to reach the constitutional questions even to define what the petitioner complains of – in Sawyer's case, for example, "*Caldwell error*." Moreover, the court does not risk the awkward outcome of establishing a new rule in a case where it has no application. See *Teague*, 109 S.Ct. at 1077-78. The rule relied upon – for example, the rule governing *Caldwell error* – exists by the time the *Teague* issues arise in connection with a particular prisoner's petition.

Indeed, Sawyer's argument illustrates the difficulties that may arise from an attempt to separate *Teague* analysis from the substance of the constitutional claims raised. Whether *Caldwell* is a new rule, and whether *Caldwell* is a rule "implicit in the concept of ordered liberty" that implicates factual innocence, both depend in part upon what *Caldwell* means, and, more specifically, upon the relation between *Caldwell* and *Donnelly*. This dependence is made unmistakably clear by Louisiana's briefing of the *Teague* issue, which suggests that *Teague* is no bar to Sawyer's *Caldwell* claim precisely because Sawyer is wrong about the relation between *Caldwell* and *Donnelly*. If the Supreme Court had made clear that *Teague* necessarily bars an inquiry into the merits of the petitioner's constitutional claims, we would perhaps have to resolve the *Teague* issues by a conditional discussion of *Teague's* application to what Sawyer says *Caldwell* might mean. Such a conjectural analysis of possible rules would, however, entail considerable awkwardness, do nothing to clarify the substantive law, and defeat rather than serve judicial economy – which would be the ostensible goal of any version of *Teague* that preempted some constitutional inquiries.

We thus choose to address the merits of Sawyer's interpretation of *Caldwell* before applying *Teague* to *Caldwell*. We do not mean, however, by adopting this strategy to suggest that *Teague* never bars inquiry into the constitutional merits of a petitioner's claim. It remains possible that an application of *Teague* to a conjectural rule may be appropriate in cases where the *Teague* issues do not turn, as they do here, upon a highly precise specification of the rule in question. We leave that issue for a case in which it

is properly presented, and turn to the merits of the constitutional arguments.

IV

At a general level, *Caldwell's* import is clear. Regardless of whether the Court moves toward or away from the *McGautha* acceptance of juror discretion, the sentencing jury must continue to feel the weight of responsibility so long as it has responsibility. Lifting the sense of responsibility frustrates the core contribution of the jury and the cardinal justification for its role. For the jury to see itself as advisory when it is not, or to be comforted by a belief that its decision will not have effect unless others make the same decision, is a frustration of the essence of the jury function. It is not surprising then that jury arguments calculated to have that effect have long been condemned by numerous jurisdictions. See *Caldwell*, 105 S.Ct. at 2642 nn. 4 & 5. See also Mello, *Taking Caldwell v. Mississippi Seriously*, 30 B.C.L.Rev. 283, 305-308 & nn. 100-114 (1989). The decision of the Court in *Caldwell* reflects this reality, insight born more of experience than of empirical study or abstract exposition.

In no way is the importance of *Caldwell* error diminished by the possibility that a state may dispense with the jury's sentencing power in capital cases. See *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The evil of *Caldwell*-type prosecutorial arguments is not that they divest juries of their responsibility, but rather that they distort the jury's understanding of a power which it in fact retains. The decision-maker empowered to choose between life and death must not be relieved of

the gravity attending that choice. Whether a judge or jury decides the sentence, the responsibility to decide must remain adjoined to the power to decide. It would, of course, be less likely that a prosecutor could mislead a judge, whose own knowledge of the law should overcome any misleading argument. But a judge who misunderstands the sentencing decision in a capital case creates a Constitutional defect no less significant than a jury which misunderstands its decision. Cf. *Hickerson v. Maggio*, 691 F.2d 792, 794-95 (5th Cir.1982).

The argument between Sawyer and Louisiana does not draw into question these general observations. Sawyer contends that *Caldwell*, recognizing the unique role of the jury in capital sentencing, imposes an especially stringent procedural safeguard by requiring that the defendant receive a new sentencing hearing if the prosecutor's argument had any effect on the jury's perception of its own responsibility. Louisiana concedes the impropriety of prosecutorial argument that misleads the jury as to its role, but contends that the sentencing phase is marred by a constitutional defect only if the prosecutorial argument rendered it "fundamentally unfair." According to Louisiana, *Caldwell* did not establish a "no effect" test for constitutional error, but simply applied *Donnelly's* "fundamental fairness" test to the facts of a sentencing hearing. On this argument, *Caldwell* extends *Donnelly* to punishment proceedings without altering *Donnelly's* rule by any reaffirmation of *McGautha's* reflections upon jury responsibility.

It is this argument which brought the case before the *en banc* court. To resolve it, we must consider *Caldwell* in some detail. We begin with the facts.

Caldwell killed the owner of a grocery store in the course of a robbery. His lawyers' plea for mercy at the sentencing phase of his capital murder trial rested on his poverty, troubled youth, and character evidence. His lawyers argued

[E]very life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So I implore you to think deeply about this matter. It is his life or death – the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell. . . . I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution. . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know – an awesome responsibility.

Caldwell, 105 S.Ct. at 2637. The argument triggered the following exchanges:

"ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

"COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

"ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

"THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

"ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so."

Id. at 2637-38. A divided Mississippi Supreme Court affirmed and the Supreme Court granted certiorari. Speaking for the Court, Justice Marshall concluded that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 105 S.Ct. at 2639. He explained that the court's post-*Furman* review of state procedures "has taken as a given that capital sentencers would view their task as the

serious one of determining whether a specific human being should die at the hands of the State." *Id.* at 2640. He then found "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.*

The State proposed three reasons why the prosecutor's argument should not upset the death sentence. The State argued that under *California v. Ramos*, 463 U.S. 992, 1001-06, 103 S.Ct. 3446, 3453-56, 77 L.Ed.2d 1171 (1983), it was free to instruct juries in capital cases about appellate processes. In part IV(a) of the *Caldwell* opinion, joined only by Justice Brennan, Justice Blackmun and Justice Stevens, Justice Marshall rejected this argument. He concluded that, unlike in *Ramos*, the argument in *Caldwell* was not relevant to a valid state penological interest and was misleading. In the *Caldwell* plurality's view, appellate review was simply not relevant to the juror's task of determining an appropriate sentence. For that reason, the prosecutor's argument that the jurors should view themselves as only taking a preliminary step in the sentencing determination served no valid state interest. Justice O'Connor's concurring opinion agreed, but refused to read *Ramos* "to imply that the giving of *nonmisleading* and *accurate* information regarding the jury's role . . . is irrelevant to the sentencing decision." *Id.*, 105 S.Ct. at 2646 (O'Connor, J., concurring; emphasis in original). In her view the prosecutor's argument was impermissible because it misled "in a manner that diminished the jury's sense of responsibility." *Id.*

The Court next rejected the state's contention that the prosecutor's argument was a reasonable response to defense counsel's argument. The Court observed that the prosecutor's reference to appellate review did not respond to defense counsel's suggestion that sentence of life would be without parole, nor to the defense's religious theme and plea for mercy.

Finally, and most importantly for our purposes, the Court rejected the State's contention that in any event the effect of the prosecutor's argument should be measured by the standard of *Donnelly v. DeChristoforo*, which would judge improper prosecutorial arguments to vitiate a sentencing proceeding only if they rendered the proceedings fundamentally unfair. The Court distinguished *Donnelly* on two grounds. First, the Court pointed out that in *Donnelly* the trial court gave a strong curative instruction to the jury, while in *Caldwell* the judge not only gave no correcting instruction but "stated to the jury that the remarks were proper." *Id.*, 105 S.Ct. at 2645. Second, in *Donnelly* the remarks were ambiguous and not focused pointedly upon " 'the principal concern' of our jurisprudence concerning the death penalty, the 'procedure by which the State imposes the death sentence.' " *Id.* (quoting *California v. Ramos*, 463 U.S. at 999, 103 S.Ct. at 3452).

Justice Rehnquist, joined by Justice White, dissented, contending that when the argument was placed in its full trial setting it "fell far short of telling the jury that it would not be responsible for imposing the death penalty." 105 S.Ct. at 2649 (Rehnquist, J., dissenting). Rather, "the thrust of the prosecutor's argument was that the jury was not *solely* responsible for petitioner's sentence." *Id.* at 2650 (emphasis in original). He observed that under

Ramos there was nothing wrong with telling a jury that its decision is subject to appellate review, and that the prosecutor did not mislead the jury by suggesting that its decision would be subject to de novo review.

The division between the *Caldwell* majority and the dissenting Justices, like the division between Sawyer's argument and Louisiana's argument, turns in significant part upon the fate of *Donnelly's* "fundamental fairness" formula in capital sentencing proceedings. As we shall see, the effect upon a death sentence of *Caldwell* error and the nature of the inquiry into whether it exists, including the record sources to be examined, are entwined parts of its very definition. That is, what a reviewing court is to look for and how it is to set about judging its effect upon a criminal conviction is part of the definition of *Caldwell* error. Much of the argument here is over the ingredients of the prohibition.

Sawyer, as we have said, argues that *Caldwell* modifies *Donnelly* by mixing in traces of the regard for jury decision-making so powerfully articulated in *McGautha*. Sawyer argues that the prosecutor's argument at the sentencing phase of his trial misled the jury regarding its role. In particular, he contends that the argument unambiguously told the jury that its role was only to recommend punishment and that others would check their decision, an argument even more pointed than in *Caldwell*. Sawyer maintains that such an argument effectively renders a proceeding fundamentally unfair by definition, and that the standard of *Donnelly* is therefore inapplicable because superfluous. It follows, he argues, that he is

entitled to a new sentencing hearing before a jury properly aware of its responsibility. According to Sawyer, neither a contemporaneous objection nor participation by the trial judge are prerequisites to a *Caldwell* claim. *Caldwell* mandates a new sentencing hearing so long as the court reviewing *Caldwell* error "cannot say that [the prosecutor's statements] had no effect on the sentencing decision." *Caldwell*, 472 U.S. at 328-329, 105 S.Ct. 2639-2640. Sawyer says that in *Kirkpatrick v. Blackburn*, 777 F.2d 272, 289-90 (5th Cir.1985), this court declared that "the no effect test applies to the state's effort to minimize the jury's sense of responsibility, not to every other improper argument." He maintains that the Supreme Court in *Darden v. Wainwright* adopted this court's position holding *Caldwell* applicable in any case where the prosecutor "mislead[s] the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 477 U.S. 168, 184 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144 (1986).

As already mentioned, Louisiana contends, in essence, that *Caldwell* merely applies *Donnelly* to a case where the combination of prosecutorial and judicial action at a sensitive moment rendered the proceedings especially unfair to the defendant. Louisiana argues that no new sentencing hearing should be ordered unless we find both that there was *Caldwell* error and that it rendered the trial fundamentally unfair. Pointing to *Darden v. Wainwright*, the State argues that Sawyer must show prosecutorial misconduct that "so infected the trial as to deny

due process." See *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly v. DeChristoforo*). Louisiana argues that the due process standard is applicable because the prosecutor's argument, when stripped of non-misleading statements, was not as clear and focused as in *Caldwell*. Louisiana stresses the absence both of any objection by defense counsel and of any signal from the trial judge that might have endorsed the prosecutorial misstatement.

We agree with Sawyer that *Caldwell* must be read in light of *McGautha*. The state cannot resist a conclusion that it improperly diminished a jury's sense of responsibility in its sentencing role with the argument that a jury with such diminished responsibility nonetheless did not render the proceedings fundamentally unfair. See, e.g., *Coleman v. Brown*, 802 F.2d 1227, 1238-41 (10th Cir.1986), cert. denied, 482 U.S. 909, 107 S.Ct. 2491, 96 L.Ed.2d 383 (1987); see also *Campbell v. Kincheloe*, 829 F.2d 1453, 1460-61 (9th Cir.1987), cert. denied, ___ U.S. ___, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988); *Dutton v. Brown*, 812 F.2d 593, 596-97 (10th Cir.1987) (en banc), cert. denied, ___ U.S. ___, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987); *Mann v. Dugger*, 844 F.2d 1446, 1457-58 (11th Cir.1988) (en banc). Cf. *Hopkinson v. Shillinger*, 866 F.2d 1185, 1226-33 (10th Cir.1989); *id.* at 1233-38 (Logan, J., dissenting). Once it is accepted that a death sentence by a jury with such a diminished sense of responsibility is "fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case" – and the Supreme Court has told us precisely that, see *Darden*, 106 S.Ct. at 2473 n. 15, – it is apparent that, as Sawyer contends, the *Donnelly* issue

of fundamental fairness is subsumed in the threshold question of whether there was *Caldwell* error.

If the state has misled the jury in the manner condemned by *Caldwell*, it can be no answer that the culprit was the prosecutor and not the judge. With either source, the error is the same. Although in *Caldwell* there was an objection and a potent affirmation of the misleading argument by the trial judge, the relevance of these events was to the question of whether the jury was actually misled. In other words, the absence of objection and trial judge participation are highly relevant to the question of whether a jury was misled, but their absence is not determinative as a matter of law of the question of whether the state misled the jury. We do not read the Court's opinion in *Darden* to the contrary.

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, ___ U.S. ___, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989). In short, a prosecutor's statements to the jury accurately describing its role will not support a *Caldwell* claim. At the same time, a statement can be literally true but quite misleading by failing, for example, to disclose information essential to make what was said not misleading. Indeed much of our law of fraud under the Securities Act rests on just such a reality. See 17 C.F.R. 240.10b-5(b).

It is suggested that, in spite of these considerations, a willingness to find *Caldwell* error from unobjected to argument by a prosecutor unwisely creates an incentive for defense counsel to not object. After all, an objection may

lead to a curative instruction and any appellate point is not lost by remaining silent. The questionable validity of the assumed incentives aside, these concerns as well as the other values that lie behind our usual insistence that error be preserved are not unique to *Caldwell* error. The essence of the doctrine of plain error is that a loss of fundamental rights outweighs the values behind rules insisting upon an objection. More to the point, the decision to entertain claimed constitutional error without a contemporaneous objection belongs in the first instance to the state, when as here, we review a state court conviction. A state may insist upon a contemporaneous objection. And, ordinarily, a federal habeas court is bound by that decision and cannot reach claims of error found by the state to have been waived. *Dugger v. Adams*, 109 S.Ct. at 1215. In short, whether to insist upon a contemporaneous objection as a matter of orderliness, as distinguished from the question of whether an objection is an element of the constitutional claim itself, is a matter for the state court.

It is suggested that even if the *Caldwell* issue must be addressed because the state reached its merits, a contemporaneous objection is an element of a *Caldwell* claim. We have concluded that a timely objection is an essential element of a claim of racial discrimination in the exercise of preemptory challenges under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Jones v. Butler*, 864 F.2d 348, 369 (5th Cir.1988) (on petition for rehearing). But the constitutional rule in *Batson* rests on a change in the requirement of proof from that of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (insisting upon proof of a pattern of discrimination by

prosecutors in cases) to the case specific procedures of *Batson*. *Teague*, 109 S.Ct. at 1066. *Batson* assures an objecting defendant that a prosecutor striking black veniremen will articulate non-racial reasons for its decisions. An objection is plainly central to a *Batson* claim. *Caldwell*, by contrast, rests on "the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 105 S.Ct. at 2646. It instructs that if the State seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death," and "we cannot say that this effort had no effect on the sentencing decision," then "that decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* In *Caldwell*, unlike in *Batson*, the constitutional defect – if it exists – is observable and measurable by a reviewing court even absent any objection. We reject the suggested analogy between these two very different doctrines.

In sum, we reject Louisiana's proffered definition of *Caldwell*. We do so after noting that its core is diminishing the responsibility of the jury by misdescribing its role under state law and after rejecting the suggestion that its elements include showings of fundamental unfairness, a contemporaneous objection or trial court participation.

Continuing our definition of *Caldwell* error, we turn to the question of what an appellate court looks to in gauging the state's conduct, and quickly find that the nature of the prohibition takes us a long way toward the answer. What has been communicated to the jury by the state cannot be disentangled from the total trial scene,

and thus that is our terrain. While the prosecutor's argument will often be the natural point of departure, we must turn to the opposing argument and then to instructions of the court, both in its formal charge and in any rulings on objections. The initial focus will be upon the close of the sentencing hearing, yet inquiry may proceed not only to the guilt phase but to jury selection as well. In short, a trial cannot be cabined into distinct segments. As the Supreme Court phrased it: "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

While this is inevitably a case-by-case inquiry with a broad terrain to be surveyed, there are a number of events that obviously may loom large and quickly focus the inquiry. First, the trial judge is an extraordinarily (sic) puissant figure. A direct and uncorrected misstatement to the jury that misleads the jury regarding its role will be difficult to salvage. For example, *Caldwell* error was found by the Eleventh Circuit when a trial judge told the jury that he was the ultimate determinant of whether the defendant was sentenced to death. The Circuit reached this conclusion even though the jury's role under Florida law is advisory. *Adams v. Wainwright*, 804 F.2d 1526, 1532-33 (1986), *modified on denial of rehearing*, 816 F.2d

1493 (1987), *rev'd on other grounds*, *Dugger v. Adams*, ___ U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). Second, the absence of objection by competent counsel may suggest that the argument as it played in the courtroom was less pointed than it now reads in the transcript. Third, the argument may take on a different hue when read as a reply to opposing counsel. Fourth, the court may have mitigated the effect of counsel's argument by instructing the jury that the judge is the sole source of the law and that the lawyer's arguments are not evidence. Fifth, veniremen often receive extensive instruction during voir dire. These instructions, as well as the questions and advices of counsel, are also relevant. Finally, through the course of trial the judge may give detailed instructions to the jury about its role. Such familiar instructions are part of the message to the jury and all must be considered. We list these lines of inquiry to explain the scope of inquiry that may be required in review of asserted *Caldwell* error, without suggesting that the list is exhaustive. By definition, it is not and cannot be. Indeed, in some cases the presence or absence of error will be readily determinable solely on the basis of the prosecutor's argument and the trial judge's treatment of it.

V

A

Sawyer's conviction was final at least by 1984 when the Supreme Court denied his petition for certiorari. See *Sawyer v. Louisiana*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). Because Sawyer wishes to rely on the Court's later decision in *Caldwell*, he must grapple with the limitation of *Teague*. Sawyer first argues that *Teague*

does not bar his argument because *Caldwell* did not announce a new rule, so that the prosecutor's argument was constitutionally infirm measured by the law in place in 1984 when his conviction became final.

The Supreme Court's decision in *Penry*, left the definition of a "new rule" in some doubt. Justice O'Connor reiterated her statement, first presented in *Teague* that a case "announces a new rule when it breaks new ground or imposes a new obligation on the State or the Federal Government, [or,] to put it differently . . . if the result was not dictated by precedent." *Penry*, 109 S.Ct. at 2944 (quoting *Teague*, 109 S.Ct. at 1070 (plurality opinion)). Yet Justice O'Connor's application of this standard led Justice Scalia, joined by three colleagues, to contend that the Court had only given "lip-service" to the *Teague* standard. *Penry*, 109 S.Ct. at 2964 (opinion of Scalia, J., dissenting; Part II). Justice Scalia said that "it challenges the imagination to think that today's result is 'dictated' by our prior cases." *Id.* at 2965. He went on to say that "[i]f *Teague* does not apply to a claimed 'inherency' as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling," and went so far as to remark that "[it] is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same term." *Id.* at 2965.

Justice Scalia's comments are especially significant because he speaks on behalf of all three Justices who joined Justice O'Connor's plurality opinion in *Teague*, and on behalf of Justice White as well. Yet, Justice Brennan, in his separate *Penry* opinion, apparently does not agree with Justice Scalia that *Teague* has been gutted. Justice

Brennan reiterates his contention, first made in his dissent from *Teague* itself, that the *Teague* rule is an "unprecedented curtailment of the reach of the Great Writ," and accuses the majority of compounding its errors by extending *Teague* to death cases.

Indeed, Justice O'Connor's application in *Penry* of *Teague*'s "new rule" formula may well have turned upon facts which she thought unique to *Penry*'s claims. In Justice O'Connor's view, *Penry* sought only to compel Texas "to fulfill the assurance upon which [*Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)] was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." 109 S.Ct. at 2945. *Penry*'s claim rested on the clearly established and specific Constitutional rule that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the offense that mitigates against imposing the death penalty." Justice O'Connor concluded that the path from *Jurek* to *Penry* involved the consistent application of an established constitutional rule to, in essence, changes in the facts.

Because of these disagreements about the meaning of the *Teague* test, the Court's opinions in *Teague* and *Penry* do not immediately yield a clearly articulable definition of a "new rule." We must interpret what Justice O'Connor has said by reference to the purposes served by the *Teague*

rule. To undertake that inquiry, we first turn to the complex of concerns now accommodated within federal habeas jurisprudence.

A federal court's role in a habeas attack on a state court conviction is only to review for errors of constitutional magnitude. The Constitution commands us to defer to federalism, and so recognizes that the solemn judgment of a state's highest court enjoys a presumption of validity, which may be overcome only for failure to abide the Constitution itself. The role that remains for federal courts is by no means modest. To the contrary, viewed over the full span of history, it is rather an extraordinary reach for superintending power. Indeed, the first legislation empowering federal courts to issue a writ for state custody did not come until the Habeas Act of 1867. Until the Court's decision in *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), "federal courts would never consider the merits of a constitutional claim raised on habeas if the petitioner had a fair opportunity to raise his arguments in the original proceeding. . . ."⁵ Seen in this light, casting our role as that of a constitutional backstop is hardly a retrenchment, and *Teague's* reach for finality is modest indeed.

Teague, whether applied to a capital sentence or to a more ordinary case, is by no means a return to the law that preceded *Brown v. Allen*, if indeed it is a turn in that direction at all. *Teague* rather reflects a distinct and basic judgment that, putting aside the cases falling within its

two provisos, there is no fundamental unfairness inherent in refusing to wield federal power to upset state court convictions and sentences of death arrived at in complete conformity to constitutional standards in place when the convictions became final. Due regard for the constitutional structure of federalism, and the protection it accords to state government, counsels the opposite – that only preservation of constitutional principles justifies the intrusion.

The *Teague* judgment about the federal role acknowledges that neither finality nor federalism will condone constitutional acquiescence in the conviction of persons factually innocent of the crime charged. Our efforts to reduce the risk of convicting an innocent person are evidenced by myriad procedural safeguards and by high requirements of proof. These restrictions reflect a commitment to accurate outcomes so firm that we consciously increase the chance of acquitting guilty persons to reduce the chance of convicting the innocent. It is not surprising, then, that the Supreme Court is fairly unanimous in its view that a state court prisoner can rely upon a fundamental constitutional rule implicating factual innocence even though that rule was not announced until after his conviction became final.

It might nonetheless be contended that the Court's "factual innocence" proviso is not enough to vindicate the rights of prisoners, and that capital cases show particularly well various considerations that compel a narrow formulation of *Teague's* "new rule" element. One reasoning along these lines might point to the inherent finality of the death penalty, and contend that the benefit of every

⁵ See *Mackey v. United States*, 401 U.S. 667, 684, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring).

announced constitutional rule should be given to a prisoner facing this extreme penalty. One might likewise argue that in habeas petitions challenging a death sentence but not the underlying conviction, the state need not fear that it will have to relitigate issues of innocence and guilt on the basis of stale evidence, and so run the risk of freeing a criminal who would have been convicted by a fair and timely trial. Finally, continuing to reason against finality interests on the basis of concerns unique to death cases, one might argue that in such cases there is no danger that the state's efforts at rehabilitation will lose their focus because of the habeas process; that habeas petitioners succeed more frequently in capital cases than in other cases; and that other factors, external to the habeas system, are responsible for delays in the execution of state prisoners.

Yet unless we suppose a perfectly stable constitutional jurisprudence, it is unclear how finality could ever be achieved if these arguments are accepted at full reach. As the Court made clear in *Penry*, the order of magnitude of punishment is not relevant to *Teague's* support of finality so long as we except rules implicating factual innocence. The "death is different" argument in this context is little more than an argument against the validity of the punishment itself. As an argument directed to the purposes of *Teague* – the matter now before us – it fails.

Of course, the penalty is different from all others in many respects. We recognize that it is the extreme of punishments when we reserve the punishment for the most extreme of crimes, as we do under our present law. Death sentences, which by their nature aim at retribution

or deterrence and not at rehabilitation, obviously do implicate different state purposes than do terms of incarceration. But that the interests are different does not imply that they are less deserving of federal deference, or that comity concerns are any less important. A state policy predicated upon the certainty of exact retribution, no less than a state policy predicated upon incarceration in a facility designed in part to rehabilitate, suffers when the prospect of punishment is confused by a series of collateral federal attacks.

Indeed, much that is unique about the law controlling death cases is in fact a powerful testament to the need for the finality-serving rules of *Teague*. The constitutionally secured rules announced for death cases by the Supreme Court since *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), have come in such number and with such rapidity that the entire jurisprudence is fairly described as being in a state of flux. During the ten year period ending with the final day of the Supreme Court's 1988 term, it granted plenary review in sixty-seven cases and at least thirty-five of those can with little dissent, be described as presenting issue of substantial reach. The destabilizing impact of such a sea-change in controlling law presents problems of administration unique to death cases. In the 1986 term alone, the Supreme Court acted on eighty requests for stay of execution. This undermines the argument that *Teague* has no application to death cases.

Nor is there anything inhumane in an insistence that a death-sentenced state prisoner confine his attack upon that sentence to the rules in effect when his conviction

became final. So long as nothing new implicates the petitioner's factual innocence, we, confronted with the need for sureness of punishment as contrasted with the never ending uncertainty and serendipitous state of a nigh open set of rules, see little to persuade us that respect for human dignity counsels against application of finality rules.

In light of the powerful reasons that justify the *Teague* doctrine, we see no cause to limit its application to the rare or extraordinary case. When a rule is indeed *dictated* by precedent – a word Justice O'Connor took care to emphasize in *Penry* as she did in *Teague* – then a state can reasonably be asked to anticipate its articulation, and enforcing the rule in the habeas proceeding will not intrude upon the state's legitimate interest in the finality of convictions. Otherwise, however, *Teague* must bar the rule's application. We do not, despite Justice Scalia's strong words in dissent, read *Penry* to the contrary. Instead, we believe that Justice O'Connor regarded *Penry* as a special case, one simply reapplying the rule of *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) to a unique development in state law. See *Penry*, 109 S.Ct. at 2945 (Opinion of O'Connor, J., Part II-B, discussing *Jurek*). Justice O'Connor honored the language of the *Teague* opinion, and we must assume she intended to honor its spirit as well.

B

Sawyer correctly observes that many state courts, including Louisiana, had before *Caldwell* developed common law rules forbidding misleading jury argument

about the importance of the jury's decision. See e.g., *Pait v. State*, 112 So.2d 380, 383-84 (Fla.1959); *Blackwell v. State*, 76 Fla. 124, 79 So. 731, 731, 735-736 (1918); *Wiley v. State*, 449 So.2d 756, 760 (Miss.1984); *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425, 427-29 (1979); *State v. Gilbert*, 273 S.C. 690, 258 S.E.3d 890, 894 (1979); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, 839 (1977); *People v. Morse*, 60 Cal.2d 631, 36 Cal.Rptr. 201, 211-212, 388 P.2d 33, 43-44 (1964); *State v. Mount*, 30 N.J. 195, 152 A.2d 343, 351-52 (1959); *People v. Johnson*, 284 N.Y. 182, 30 N.E.2d 465, 467 (1940). For example, the Louisiana Supreme Court ordered a new sentencing hearing in a 1982 capital case when, without objection, the prosecutor argued to the jury that the "buck" started with them and did not end there, and that "everything" will more than likely be reviewed by every appeals court in the United States. *State v. Willie*, 410 So.2d 1019, 1034-35 (La. 1982). But it does not necessarily follow from the circumstance that Louisiana law forbade the argument made by Sawyer's prosecutor when it was made, that the Supreme Court did not announce a "new" rule in *Caldwell*.

Sawyer's argument fails to deal with *Teague's* explicit offer of *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), as an example of a decision that created a "new rule." *Ford* held that the Eighth Amendment prohibits states from inflicting the penalty of death on an insane prisoner. Execution of the insane was prohibited at common law. Indeed, the *Ford* Court observed that "[t]he bar against executing a prisoner who has lost his sanity bears impressive historical credentials . . ." 477 U.S. at 406, 106 S.Ct. at 2600. Moreover, twenty-six states of the fourth-one with a death penalty had "statutes

explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence." *Id.* at 408, n. 2, 106 S.Ct. at 2601, n. 2. Sawyer's reliance upon *Caldwell's* common law roots and its relationship to the rules of several states, including Louisiana, cannot be squared with the Supreme Court's view that it created a new rule in *Ford v. Wainwright*.

There was no federal jurisdiction over Sawyer's present claim until this type of error gained a constitutional footing. *Caldwell* was certainly new in its conclusion that such arguments violated the Eighth Amendment. See *Mello*, 30 B.C.L. Rev. at 305. Of course, when Sawyer's conviction became final, *Donnelly* would have authorized federal jurisdiction over a habeas petition attacking the sentence on due process grounds. Yet, as we have seen, Sawyer persuasively contends that *Caldwell* was more than a straightforward application of *Donnelly* to new facts. Our question is then whether these changes suffice to make *Caldwell* a new rule within the meaning of *Teague*.

The *Teague* court held that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 109 S.Ct. at 1070 (emphasis in original). Accord, *Penry*, 109 S.Ct. at 2944. We have little difficulty in concluding that so measured, *Caldwell's* greatly heightened intolerance of misleading jury argument is a new rule within the meaning of *Teague*. Its direct impact upon the finality of state convictions is illustrated by this case.

Sawyer, however, nonetheless contends that this heightened standard for review of prosecutorial argument does not create a new rule. He has two arguments. First, Sawyer says that Louisiana not only condemned *Caldwell*-type prosecutorial argument, but did so under an Eighth Amendment standard identical to the *Caldwell* standard. For this proposition, Sawyer cites a string of Louisiana cases explaining that Louisiana's death penalty procedures were designed to comply with the Supreme Court's Eighth Amendment decisions, see, e.g., *State v. Payton*, 361 So.2d 866, 870-73 (La.1978), *State v. Sonnier*, 379 So.2d 1336, 1370 (La.1980), and *State v. Willie*, 410 So.2d 1019, 1032-33 (La.1982), and another string of Louisiana cases condemning *Caldwell*-type prosecutorial arguments, see, e.g., *State v. Berry*, 391 So.2d 406, 418 (La.1980), *cert. denied*, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981); *Willie*, 410 So.2d at 1034-35, and *State v. Robinson*, 421 So.2d 229, 231-34 (La.1982).

Yet it is one thing to say that a state, inspired by earlier constitutional decisions, had anticipated *Caldwell* as a matter of state law, and a very different matter to say that the state had recognized a *Caldwell*-type rule as a constitutional restriction its own power. In an effort to bring the Louisiana cases within the latter category, Sawyer relies heavily on the Louisiana Supreme Court's recent post-*Caldwell* decision in *State ex rel. Busby v. Butler*, 538 So.2d 164, 173 (La.1988). There, the Louisiana Court said it need not consider a *Caldwell* claim on collateral attack after rejecting a similar state law challenge on direct review, for *Caldwell* "did not change our previous case law." Again, however, this statement and the other remarks in *Busby* indicate only that the state law and

Caldwell rules are coincident. The remarks do not show that Louisiana law condemned *Caldwell* argument because it regarded such argument as an Eighth Amendment violation. We therefore need not decide whether, if a rule is "new" as a matter of constitutional interpretation but not "new" in state interpretations of the federal Constitution, it is nonetheless "new" for purposes of the *Teague* bar upon collateral federal challenges to state convictions.

Sawyer next contends that this Circuit in *Moore v. Blackburn*, 774 F.2d 97, 98 (5th Cir.1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986), has already decided that *Caldwell* is not a new rule. In *Moore*, we held that even if the *Caldwell* standard were separable from the Louisiana state standard for assessing prosecutorial argument, petitioner Moore should have anticipated in an earlier habeas petition the possibility of a distinct constitutional standard. We therefore held that Moore's *Caldwell* argument was not "new" for purposes of the writ abuse doctrine, and stated that the doctrine would bar the argument. Sawyer's attempt to rely on *Moore* must fail, for the meaning of "newness" differs in writ abuse cases from its meaning in *Teague* cases. In writ abuse cases, the key question is whether a particular argument is being made by attorneys: the argument is not "new" if it is being made, and so should be known to attorneys. The Supreme Court makes clear, however that a rule is new for purposes of *Teague* if it has not been accepted at the time the petitioner's conviction became final. *Teague*, 109 S.Ct. at 1070. *Moore* thus cannot bear the freight Sawyer would put on it.

C

The *Teague* test allows two exceptions. Sawyer, however, cannot contend that the sentence imposed upon him was unlawful because the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution. He contends only that the state's sentencing procedure was unconstitutionally administered. *Teague's* first exception, dealing with substantive limitations upon the criminal law-making authority, therefore does not apply.

We turn, then, to the plurality's insistence in *Teague* that a new rule may be relied upon by a habeas petitioner if it both "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty" and "procedures without which the likelihood of an accurate conviction is seriously diminished." Sawyer contends that we should not in his case apply the "accurate conviction" qualification to Harlan's proviso. First, Sawyer argues that the qualification is only a plurality view. The *Penry* opinions did not discuss the "fundamental to ordered liberty" proviso, or the "actual innocence" qualification to it. However, Justice White's joinder in Justice Scalia's dissent, and in Part II-A of Justice O'Connor's opinion (which references the *Teague* plurality's formulation of the exceptions), strongly suggests that Justice White has adopted the position of the *Teague* plurality. In any event, our short answer is that pending further direction from the Supreme Court, and in particular the full view of Justice White, we should follow the course set by the plurality as best we can.

Second, Sawyer argues that confining use of new rules to those implicating factual innocence has not relevance to a jury's decision to impose a death and not a life sentence. We are not persuaded. A habeas petitioner may not escape this imitation use of a new rule by confining his attack to the jury's decision to impose a death rather than life sentence. Rather, such a petitioner must show that the new rule insists on procedures without which the correctness of the jury's decision to punish by death rather than by life imprisonment is seriously diminished.

We thus accept the plurality's formulation of the provision, and turn to its application. Our task is made difficult by the newness of the amalgam of the second proviso as well as its uncertain precedential footing. Justice O'Connor's opinion for the plurality insisted that it is "unlikely that many such components of basic due process have yet to emerge." 109 S.Ct. at 1077. Justice O'Connor went on to say that these components are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus – that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods" (citations omitted). The new rule contended for in *Teague* was an extension to petit juries of the fair cross section requirement of a jury venire. The plurality opinion concluded that such a new rule "would not be a 'bedrock procedural element' that would be retroactively applied under the second exception. . . ." *Id.* at 1077.

While the Court has made plain that it expects to encounter few newly discovered bedrock procedural

rules, it is not clear how *Caldwell*, with its condemnation of a particular type of jury argument, fits into the *Teague* scheme. This difficulty stems in part from uncertainty about *Teague's* standard for sorting the bedrock from the host of other rules calculated to enhance the efficiency and fairness of a trial. We can immediately put aside rules that only enhance as distinguished from rules essential to fundamental fairness. This first cut is informed by developed principles of incorporation doctrine that leave the states free of all but the core assurances, variously expressed as rejecting "tail with the hide" and "jot-for-jot" incorporation. See e.g., *Duncan v. Louisiana*, 391 U.S. 145, 181, 88 S.Ct. 1444, 1465, 20 L.Ed.2d 491 (1968) (Harlan, J., dissenting). For example, the Fourteenth Amendment requires Louisiana to provide Sawyer a jury and a fundamentally fair trial. Louisiana has wide latitude in its choice of procedures for doing so and few procedures are so essential as to be required by the Fourteenth Amendment. This distinction is reflected in our willingness to find errors to be harmless and our refusal to grant relief absent a demonstration not only that the rule was violated but also that its violation rendered a trial fundamentally unfair.

Caldwell manifestly implicates two principles that would be fundamental in the sense required by *Teague's* second proviso. The first is *Donnelly's* restriction requiring that a proceeding not be "fundamentally unfair" to the defendant. The second is the more expansive regard for jury discretion suggested by *McGautha*, a regard trimmed back, as we have mentioned, by the Court's later interpretations of the Eighth Amendment. Were Sawyer seeking to rely on either of these principles as new rules,

his argument would be compelling. Yet *Donnelly's* principle is not new by comparison to Sawyer's conviction, and McGautha's general themes do not constitute a rule at all. What Sawyer seeks to rely upon is *Caldwell's* modification of *Donnelly* in light of the ideals discussed in *McGautha*. That modification is not itself so fundamental as to be "implicit in the concept of ordered liberty." After all, the only defendants who need to rely on *Caldwell* rather than *Donnelly* are those who must concede that the prosecutorial argument in their case was not so harmful as to render their sentencing trial "fundamentally unfair."

A recent decision of the Supreme Court supplies additional guidance for our inquiry. In *Dugger v. Adams*, the Court decided whether Florida's procedural default rule barred Adams's *Caldwell* claim. To resolve that issue, the Court had to determine whether a "fundamental miscarriage of justice" would result if the procedural default rule were permitted to defeat Adams's *Caldwell* claim. The Court held that no such miscarriage of justice would arise.

In reaching its conclusion, the *Adams* Court wrote as follows:

The dissent "assumes *arguendo*" that a fundamental miscarriage of justice results whenever "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision." . . . According to the dissent, since "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined," . . . the standard for showing a fundamental miscarriage of justice is necessarily satisfied. We reject this overbroad view. Demonstrating that an error is by its nature the kind of

error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case," . . . into an all too ordinary one.

109 S.Ct. at 1217-18 & n. 6.

Adams, of course, does not directly control *Teague's* application to a *Caldwell* claim. *Adams* applies a "fundamental miscarriage of justice" standard to determine whether a *Caldwell* claim might fit within an exception to the procedural default rule. *Teague* applies an "implicit in the concept of ordered liberty" and "implicating factual innocence" standard to determine whether a *Caldwell* claim might fit within an exception to the doctrine barring habeas petitioners from relying on new rules. The verbal formulae are different, and their application thus might differ, too. Moreover, the *Adams* miscarriage standard requires scrutiny of the facts of a particular case, while the *Teague* ordered liberty standard looks to the character of the general rule asserted.

Nonetheless, we must take care not to exaggerate the substantive import of these semantic differences. Similar concerns underlie both the procedural default doctrine and the *Teague* doctrine prohibiting reliance upon new rules. Both doctrines recognize the importance of finality in criminal convictions. Both doctrines promote federal-state comity by requiring federal courts to defer to the integrity of state convictions. And both doctrines put a premium upon the obligation of defendants to raise all relevant arguments before their convictions become final.

Indeed, in some respects *Teague* functions as a radical extension of the procedural default rule by forcing defendants to establish a new rule on direct appeal rather than on collateral attack, if they wish to rely on such a rule. Because of the similarities between the two doctrines, it is difficult to see why a *Caldwell* violation should be sufficiently fundamental to require an exception to the "new rule" doctrine, but not so fundamental as to require an exception to the procedural default doctrine.

Adams is also important for another reason: given the particular facts of *Adams*'s own case, the Court's disposition of the case presupposes a judgment about the importance of *Caldwell* error to a sentencing determination. In *Adams*, as the Court noted, the trial judge "found an equal number of aggravating and mitigating circumstances." The court made clear that there was no fundamental miscarriage of justice even though *Caldwell* error goes to the accuracy of the sentencing procedure, and even though the case was a close one. In short, the mere possibility of a close case did not make the alleged error's threat to accuracy sufficiently fundamental to warrant exemption from the procedural bar.

Sawyer's *Caldwell* claim runs into comparable problems when analyzed in light of the second *Teague* proviso. Sawyer can argue at most that there would be a possibility, absent the alleged *Caldwell* violation, of a different outcome to the jury's sentencing procedure. Yet, as we have already stated, the Court's *Teague* opinion makes quite clear that not every procedural rule affecting the accuracy of a trial will fit within the "ordered liberty" proviso. To hold otherwise would be to cling to "jot-for-jot" or "tail-with-the-hide" incorporation, and to make

the "extraordinary case into the ordinary one." Instead, the examples listed by the *Teague* Court – trial by mob rule, use of perjured testimony, or the extraction of confessions through brutal torture – either so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case. Here the jury did have an opportunity, even if procedurally flawed, to contemplate and review the relevant evidence. Sawyer's *Caldwell* claim has neither the overwhelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second *Teague* proviso.

Our extended exposition of the nature of *Caldwell* error reinforces the inferences we drew from the Supreme Court's decision in *Adams*. *Caldwell* error does indeed implicate core aspects of the sentencing procedure. As such, it implicates both the integrity of that procedure and the accuracy of the determination in any particular case. Yet to say that accuracy is implicated is not to say that the defendant is necessarily prejudiced. In fact, *Caldwell*'s deference to the fundamental character of the jury's role manifests itself precisely in its refusal to require actual prejudice to the defendant. *Caldwell* views prosecutorial argument as a basis for reversal if, when viewed within the context of the whole, it had an effect upon the jury's perception of its role in the sentencing proceeding. It is, of course, unusual to presume the existence of reversible error, on the basis of the prosecutor's comments, absent any showing of prejudice. This presumption is an important one, and, we would hope, will contribute to the increased integrity and accuracy of

criminal procedure in this sensitive area. But none of this makes *Caldwell* so fundamental, or so connected with factual innocence, as to fit within *Teague's* second proviso.

VI

Of course, if Sawyer were able to show actual prejudice, he would be able to proceed under the more general fundamental fairness standard of *Donnelly v. DeChristoforo*. Yet Sawyer has not contended that such prejudice exists here, and we, after a thorough review of the record, can find none.

We have covered considerable ground about the content of the *Caldwell* rule. Yet, the dissent falls silent on this set of issues, perhaps because the posture of the case does not require that we apply *Caldwell*. It is then only on narrow, but crucial grounds, that our opinion is engaged, and to assist its focus we conclude with one observation in reply to the dissenting view.

Judicial tradition demands that new rules find their trace in older ones. This search is near the core of discipline that distinguishes judges from other decision makers. Judges excel at the task. Such artisans possess a very important tool – a gauge of generality. It is no surprise then that *Teague's* effort to limit federal habeas by asking whether a rule is new invites those who resist the restriction to reach for their tool kit. At a sufficient level of abstraction there are no new rules. The judicial artisan can start by asserting that the old rule is that a trial must be fundamentally fair, that a defendant is entitled to procedural due process. Stated this generally there have been few if any new rules for the trial of criminal cases.

This dissent does precisely this, resting its assertions on little more than that the old rule is the prohibition of unfair jury argument. Its old law is unnarrowed by any definition of its reach and force such as whether it treats such state conduct as inherently destructive of required fairness or insists on demonstrated prejudice in a given case. Louisiana rejected Sawyer's claim and Sawyer has no federal habeas claim without *Caldwell*. Nonetheless, we are told that *Caldwell* was indicated by precedent, that it broke no new ground and that it imposed no new obligation on the states. We are asked to believe that *Caldwell* simply applied well established constitutional principles. If to the uninitiated this is dissemblance, unhappily it is to the cognoscenti business as usual. By adroit use of the generality gauge our able dissenting colleagues can breathe superficial credibility into the fable that *Caldwell* broke no new ground, imposed no new obligation on the states and was dictated by precedent. With all deference, there is afoot here no more than a resistance to the principles of finality adopted by *Teague*. We should not play such sophisticated games. The issue here is whether the federal judiciary will take hold of the open ended character of the habeas remedy it has created. We are persuaded that little or nothing is left of *Teague's* promise if the dissent's view is accepted. We think that this artisan's destruction of so recent a decision by the Supreme Court should be rejected and we do so. Ultimately only *Teague's* authors can tell us if they meant what they said or if they have changed their minds.

For these reasons, we find that *Teague* bars Sawyer from pursuing his *Caldwell* claim. We affirm the district

court's decision denying Sawyer's petition for a writ of habeas corpus.

KING, Circuit Judge, with whom REAVLEY, POLITZ, JOHNSON, and WILLIAMS, Circuit Judges, join dissenting:

Sawyer has been found guilty of capital murder. He does not contest his guilt. The only issue before the en banc court is whether he is entitled to have a properly instructed jury determine that he should be executed by the State or spend the rest of his life in jail, without the benefit of probation or parole.¹ Whatever we decide, he will not be set free.

The majority has rejected the interpretation of *Caldwell v. Mississippi*² on which the state relied in urging that we deny Sawyer's petition for habeas relief. The majority concludes, however, that the State may execute Sawyer, regardless of the merits of his *Caldwell* claim, because *Caldwell* established a "new rule" in constitutional law and, under the Supreme Court's recent decision in *Teague v. Lane*,³ Sawyer may not receive the benefit of its application because his conviction became final before *Caldwell* was decided.

If, as the majority admits, "it is not clear how *Caldwell* . . . fits into the *Teague* scheme" because of the "newness of the amalgam" of standards *Teague* set on "uncertain precedential footing," we do not see why it is

¹ See La.Rev.Stat. Ann. 14:30(C) (1980).

² 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

³ ___ U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

incumbent on us to condemn Sawyer to die instead of ordering the State to put the life-or-death issue to a jury that is not only not misled but is fully informed of its responsibilities. In contrast to the majority's ambivalence, we harbor no doubt that Sawyer is entitled to the constitutional protections guaranteed by the eight amendment: *Caldwell* did not establish a "new rule," and even if it did, *Teague* requires its retroactive application. We, therefore, respectfully dissent.

I.

Although the majority opinion contains a lengthy exegesis on the role of the jury and the nature of *Caldwell* error, it does not reach the merits of Sawyer's claim. We would find that on the facts of Sawyer's case, his sentence is invalid under *Caldwell*. The prosecutor, in describing the jury's role, remarked:

the law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type*

of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).

the prosecutor went on to describe the brutal nature of the crime and, briefly its impact on the victim and her mother. then, once again turning to the function of the jury, the prosecutor stated:

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you*

do have the courage of your convictions (emphasis supplied).

The prosecutor's arguments in Sawyer's case fall squarely within *Caldwell's* prohibition of misleading and inaccurate arguments regarding appellate review that seek to diminish the jury's sense of its responsibility in capital sentencing. The trial court did not correct these statements, and because we cannot say that these comments had no effect on the jury's decision, we would vacate Sawyer's sentence and grant him a new sentencing hearing.⁴

II

Whether Sawyer may receive the benefit of the constitutional protection enunciated in *Caldwell* depends, however, on the threshold determination that *Caldwell* established a "new rule." Conceding that "[i]t is . . . often difficult to determine when a case announces a new rule," the plurality in *Teague* nevertheless offered the following explanation: "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new Rule if the result is not *dictated* by precedent existing at the time the defendant's conviction became final."⁵

The plurality recognized that constitutional rules will fall along a "spectrum" – from those that fit neatly within

⁴ See *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

⁵ *Id.* ___ U.S. at ___, 109 S.Ct. at 1070 (O'Connor, J., plurality opinion) (emphasis in original) (citations omitted).

the rubric of settled law to those that constitute a clear break from prior precedent – but provided little additional guidance for determining at *which* point a rule is not “dictated” by precedent and, therefore, “new” for retroactivity purposes.⁶

In *Penry v. Lynaugh*,⁷ however, the Court began to elaborate the meaning of the term “new rule.” The Court held that although it had previously found the Texas sentencing scheme facially valid,⁸ the scheme, as applied to Penry, unconstitutionally limited the jury’s ability to consider certain, relevant mitigating evidence.⁹ The Court held that this determination did not constitute a “new rule” given the requirement that capital sentencing procedures permit the sentencing jury to consider and give effect to all relevant mitigating evidence.¹⁰

The Court reasoned that a rule is not “new” for purposes of retroactivity analysis when it “fulfill[s] the assurance” upon which a previous case “was based” or merely “interpret[s] broadly” that previous case.¹¹ The Court thus made clear that its “dictated by precedent” language was not intended to categorize as “new” every rule that does not fit precisely within the pattern of a

⁶ See *ibid.*

⁷ ___ U.S. ___, 109 S.Ct. 2934, ___ L.Ed.2d ___ (1989).

⁸ See *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

⁹ *Penry*, ___ U.S. at ___, 109 S.Ct. at 2951.

¹⁰ *Id.* at ___, 109 S.Ct. at 2943-47; see *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

¹¹ *Penry*, ___ U.S. at ___, 109 S.Ct. at 2945.

previously decided case. Rather, the Court recognized that the process of constitutional interpretation routinely requires courts to articulate extant law and apply established principles of law to different facts and in different contexts. Rules that are the product of this gradual process of refining and developing doctrine are not “new.” To define “new” rules more broadly would depart significantly from the traditional understanding of constitutional jurisprudence as an evolving body of principles rather than jarring series of revolutionary pronouncements.¹²

This differentiation between elaborating and applying established principles, on the one hand, and announcing new rules that are dissonant with prior understandings of the law, on the other hand, derives directly from Justice Harlan’s view of retroactivity that the Court adopted in *Teague* and applied in *Penry*. Justice Harlan observed “that many, though not all, of this Court’s constitutional decisions are grounded upon fundamental principles . . . whose meanings are altered slowly and subtly as generation succeeds generation.”¹³

¹² See *Yates v. Aiken*, 484 U.S. 211, ___, 108 S.Ct. 534, 538, 98 L.Ed.2d 546 (1988); *Truesdale v. Aiken*, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987); *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 714, 93 L.Ed.2d 649 (1987); *Allen v. Hardy*, 478 U.S. 255, 258 106 S.Ct. 2878, 2880, 92 L.Ed.2d 199 (1986); *Shea v. Louisiana*, 470 U.S. 51, 57, 105 S.Ct. 1065, 1068, 84 L.Ed.2d 38 (1985); *United States v. Johnson*, 457 U.S. 537, 549-50, 102 S.Ct. 2579, 2586-87, 73 L.Ed.2d 202 (1982); *Solem v. Stuims*, 465 U.S. 638, 662, 104 S.Ct. 1338, 1352, 79 L.Ed.2d 579 (1984) (Stevens, J., Dissenting); see also Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U.Chi.L.R. 719, 749-54 (1966).

¹³ *Desist v. United States*, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting).

He reasoned that such rules are not "new" and should be given retroactive application in habeas proceedings because "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final."¹⁴

Caldwell held that a prosecutor may not "le[a]d" a jury to "believe" that it is not "responsib[le] for determining the appropriateness of [a] defendant's death."¹⁵ The Court based this rule upon its belief that such prosecutorial misconduct "was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability' " in capital sentencing, and that such conduct, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment"¹⁶ Arguments that seek to diminish the jury's sense of responsibility, the Court explained, undermine core eighth amendment values:

The "delegation" of sentencing responsibility that the prosecutor here encouraged . . . would deprive [the defendant] of . . . [the] right to a fair determination of the appropriateness of his death . . . , for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination,

¹⁴ *Id.* at 264, 89 S.Ct. at 1041.

¹⁵ *Caldwell*, 472 U.S. at 329, 105 S.Ct. at 2639.

¹⁶ *Id.* at 340, 105 S.Ct. at 2645 (footnote omitted) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (Stewart, J., plurality opinion)); See *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "(those) compassionate or mitigating factors stemming from the diverse frailties of humankind."¹⁷

Far from articulating an unanticipated principle of law or breaking with a past understanding of the law, *Caldwell* interpreted and followed directly the Court's own eighth amendment jurisprudence. The *Caldwell* Court fulfilled the assurance enunciated in *Furman v. Georgia*¹⁸ and *Gregg v. Georgia*¹⁹ that capital punishment not be administered "wantonly" or "freakishly" or in an "arbitrary and capricious manner;"²⁰ it applied the "need for reliability in the determination that death is the appropriate punishment in a specific case," assured in *Woodson v. North Carolina*,²¹ *Lockett v. Ohio*,²² and *Eddings v. Oklahoma*,²³ to a situation in which that reliability was compromised; it fulfilled the promise of *Woodson*, *Lockett*,

¹⁷ *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640 (quoting *Woodson*, 428 U.S. at 304, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

¹⁸ 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

¹⁹ 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

²⁰ *Gregg*, 428 U.S. at 188, 96 S.Ct. at 2932 (Stewart, J., plurality opinion) (citing *Furman*, 408 U.S. at 310, 92 S.Ct. at 2763 (Stewart, J., concurring)).

²¹ 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1978) (Stewart J., plurality opinion).

²² 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 571 L.Ed.2d 973 (1978) (Burger, C.J., plurality opinion).

²³ 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982).

and *Eddings* that a defendant be sentenced to death only after an individualized determination of his moral culpability;²⁴ and it applied the need first articulated in *McGautha v. California*²⁵ that jurors be "confronted with the truly awesome responsibility of decreeing death for a fellow human"²⁶ to a case in which the prosecutor specifically instructed the jury that it had no such responsibility. With due respect to the three dissenters in *Caldwell*, it is difficult to imagine the Court reaching any other conclusion given these precedents.

There was, moreover, no precedent inconsistent or dissonant with *Caldwell* at the time it was decided. While the Court, in *Donnelly v. DeChristoforo*,²⁷ had imposed a more stringent due-process test for claims of improper argument made at the guilt/innocence phase of trial, this analysis applied neither to improper argument at sentencing proceedings nor to argument implicating "specific guarantees of the Bill of Rights."²⁸ The *Donnelly* Court thus left open the possibility that improper arguments at sentencing not violative of the Due Process Clause may be held to contravene the eighth amendment's requirements.

²⁴ See *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion); *Lockett*, 438 U.S. at 601-05, 98 S.Ct. at 2963-65 (Burger, C.J., plurality opinion); *Eddings*, 455 U.S. at 112-15, 102 S.Ct. at 875-77; see also *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969, ___ L.Ed.2d ___ (1989) (O'Connor, J., concurring); *South Carolina v. Gathers*, ___ U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

²⁵ 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971).

²⁶ *Id.* at 208, 91 S.Ct. at 1467.

²⁷ 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

²⁸ *Id.* at 643, 94 S.Ct. at 1871.

Similarly, in *California v. Ramos*,²⁹ the Court posited its approval of jury instructions containing information regarding postconviction procedures on the fact that the information was both relevant and accurate.³⁰ While the Court in *Ramos* did not address whether a prosecutor violates the Constitution by presenting irrelevant and misleading information concerning post-conviction proceedings, its emphasis on the nature of the instruction forecast that such information would be found to undermine the reliability of the sentencing process by injecting into it an arbitrary factor in violation of the eighth amendment.³¹

If, as the Court in *Penry* instructed, we should consider a case "dictated by precedent" and not "new" for retroactivity purposes when it "fulfill[s] the assurance[s]" of or "interpret[s] broadly" principles articulated in a previous case,³² it is difficult to see how the majority may conclude that *Caldwell* announced a "new rule." *Caldwell* fulfilled the assurance of and interpreted faithfully the settled principle in eighth amendment jurisprudence that a verdict of death must rest upon the reliable determination of a jury accurately informed of its "awesome responsibility;" the same line of eighth amendment cases that compelled the result in *Penry* thus compelled the result in *Caldwell*.

²⁹ 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

³⁰ *Id.* at 1004, 1009, 1012, 103 S.Ct. at 3455, 3457, 3459.

³¹ See *Caldwell*, 472 U.S. at 342-43, 105 S.Ct. at 2646-47 (O'Connor, J., concurring in part and concurring in the judgment) (citing *Ramos*, 463 U.S. at 999, 1010, 103 S.Ct. at 3451, 3458).

³² *Penry*, ___ U.S. at ___, 109 S.Ct. at 2944.

The majority contends that the foregoing analysis unduly restricts the scope of *Teague*. Its criticism of our interpretive method is misdirected, however, for the majority's dispute is not, in reality, with *our* interpretation of *Teague*, but with *Penry's* elaboration of the "new rule" standard set forth in *Teague*. Indeed, the majority's criticism of our analysis echoes precisely Justice Scalia's dissent in *Penry*.³³ In admonishing us to wait for "*Teague's* authors [to] . . . tell us if they meant what they said," the majority ignores the fact that *Teague's* authors have already spoken in *Penry* and have effectively rejected any definition of a "new rule" that would sweep broadly enough to encompass *Caldwell*.

If anything, Sawyer's claim that *Caldwell* followed eighth amendment jurisprudence consistently is stronger than *Penry's* for no precedent like *Jurek* existed in the *Caldwell* context to lead state courts to reach a conclusion different from the Supreme Court's holding in *Caldwell*. Indeed, the Court in *Caldwell* observed that after *Furman*, several state supreme courts – including Louisiana's – had anticipated *Caldwell* and found that *Caldwell*-type errors undermined the validity of a death sentence;³⁴ it noted that some state courts had prohibited such arguments in both capital and noncapital cases even before *Furman*.³⁵

³³ *Id.* at ___, 109 S.Ct. at 2963.

³⁴ *Caldwell*, 472 U.S. at 333-34 & n. 4, 105 S.Ct. at 2642 & n. 4 (citing cases).

³⁵ *Id.* at 334 & n. 5, 105 S.Ct. at 2642 & n. 5 (citing cases).

At least five years before the Supreme Court decided *Caldwell*, the Louisiana Supreme Court held that arguments that diluted the jury's sense of responsibility for imposing a capital sentence injected an arbitrary factor into the jury's decision and invalidated the sentence. In 1980, when denying an application for rehearing in *State v. Berry*,³⁶ the Louisiana Supreme Court recognized

[a]ny prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, . . . then the defendant has not had a *fair trial* in the sentencing phase, and the penalty should be vacated. . . . The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.³⁷

In 1982, in *State v. Willie*,³⁸ the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing when the prosecutor referred to appellate review and told the jury that "the buck really don't [sic]

³⁶ 391 So.2d 406 (La.1980) (denial of application for rehearing), *cert. denied*, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

³⁷ *Berry*, 391 So.2d at 418 (emphasis in original) (portions of text omitted); *see id.* at 419-21 (Calogero, J., dissenting from denial of rehearing); *State ex rel. Williams v. Blackburn*, 396 So.2d 1249, 1250 (La.1981) (Dennis, J., dissenting from denial of stay); *id.* at 1250 (Calogero, J., concurring in denial of the stay); *State v. Monroe*, 397 So.2d 1258, 1270 (La.1981), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1411 (1983).

³⁸ 410 So.2d 1019 (La.1982), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 723 (1984).

stop with you. The buck starts with you. . . . [W]hat I'm asking you to do is start the buck rolling."³⁹ The court quoted *Berry*, and added:

This type of argument may not be made in a criminal case in which the punishment may be capital. Jurors should approach the task of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. An argument improperly diminishes the jury's duty and responsibility if it implies that a reviewing court can substitute its judgment as to choice of punishment or that the decision of whether the sentence of death is appropriate is not entirely the jury's responsibility.⁴⁰

In *State v. Robinson*,⁴¹ also in 1982, the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing because the prosecutor referred repeatedly to the jury's sentence as a "recommendation" that did not have a "strong possibility" of "get[ting] through all of that [appellate] review."⁴² Citing *Berry* and *Willie*, the court anticipated the "no effect" test required by the eighth amendment, stating:

The closing argument requires that the death sentence be set aside, because this court cannot

³⁹ *Id.* at 1034.

⁴⁰ *Id.* at 1035, see *State v. Clark*, 492 So.2d 862, 870-71 (La.1986).

⁴¹ 421 So.2d 229 (La.1982).

⁴² *Id.* at 231-33.

determine that misleading and improper remarks of this magnitude did not influence the jury's recommendation. . . . [W]e cannot say that the jury's sentencing discretion was unaffected by the prosecutor's repeated and often misleading references to the largely irrelevant consideration of appellate review of death sentences.⁴³

As the Louisiana Supreme Court observed, *Caldwell* neither imposed a new obligation on prosecutors or courts nor broke new ground in Louisiana.⁴⁴ Before the Supreme Court decided *Caldwell*, Louisiana had already prohibited *Caldwell* argument and required reversal of sentences when it found such error. Moreover, in finding that *Caldwell* argument injected an arbitrary factor into the sentencing process, the Louisiana courts relied on the same eighth amendment principles that compelled the Supreme Court's decision in *Caldwell*. In *State v. Sonnier*,⁴⁵ the Louisiana Supreme Court stated that under Louisiana law, the court "is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by passion, prejudice or any arbitrary factor."⁴⁶ The court described how Louisiana modelled its provision for independent appellate review of death sentences on the Georgia procedure sanctioned in *Gregg v. Georgia*, and cited approvingly the Georgia Supreme Court's reversal of a death sentence when it found that "an unobjected to argument by a [prosecutor]

⁴³ *Id.* at 233-34 (portions of text omitted).

⁴⁴ See *State ex rel. Busby v. Butler*, 538 So.2d 164, 173 (La.1988).

⁴⁵ 379 So.2d 1336 (La.1979).

⁴⁶ *Id.* at 1371.

may have influenced the jury to impose a more severe sentence than unbiased judgment would have given."⁴⁷ In *Willie*, the court again adverted to *Gregg*'s requirement that a sentencer's discretion be channelled to avoid arbitrary and capricious imposition of the death penalty, and held that the prosecutor's improper argument regarding appellate review "lessened" the jurors' appreciation of their "awesome responsibility" and "created a reasonable possibility that the death sentence was imposed under the influence of passion, prejudice or arbitrary factors."⁴⁸ Echoing *McGautha*, the Louisiana Supreme Court thus anticipated almost exactly Justice O'Connor's conclusion in *Caldwell* that such arguments "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' . . . or through 'whim . . . or mistake.' "⁴⁹

The majority concedes that numerous states, including Louisiana, forecast *Caldwell* by prohibiting the arguments that the *Caldwell* Court ultimately barred, but concludes that because states' *Caldwell* precursors did not impose an independent constitutional constraint on state power, they are irrelevant to *Teague*'s analysis. That the state courts adopted these rules before *Caldwell* to conform state law to perceived eighth amendment requirements, rather than conforming to an independent federal

⁴⁷ *Id.* at 1370-71 & n. 4.

⁴⁸ *Willie*, 410 So.2d at 1032, 1034.

⁴⁹ *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451, and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

constitutional constraint articulated by the Supreme Court, is a distinction without a difference for the purpose of determining whether *Caldwell* announced a "new rule." In either case, the state courts based their interpretations on the eighth amendment, and their widespread anticipation of *Caldwell* strongly suggests that the Supreme Court's subsequent decision in that case maintained a continuity with and fulfilled clearly discernible principles in eighth amendment jurisprudence.

In *Dugger v. Adams*,⁵⁰ the Supreme Court found these state laws sufficiently established to conclude that the legal basis for raising a *Caldwell*-type claim prior to *Caldwell* was "reasonably available to counsel," and that *Caldwell* was, therefore, of such vintage as to be subject to the procedural-bar rule.⁵¹ In *Moore v. Blackburn*,⁵² we considered a writ application based on *Caldwell* barred by the abuse-of-writ doctrine for the same reason. If both the Supreme Court and this court have considered, on the basis of state laws anticipating *Caldwell*, a *Caldwell*-type claim sufficiently established to negate cause for failing to raise it years before *Caldwell*, how may we now ignore these state laws and conclude that *Caldwell* is novel?

Contrary to the majority's assertion, the *Teague* plurality's citation of *Ford v. Wainwright*⁵³ as an example of a

⁵⁰ ___ U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

⁵¹ *Id.* at ___, 109 S.Ct. at 1215-17.

⁵² 774 F.2d 97 (5th Cir.1985), *cert. denied*, 476 U.S. 1176, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986).

⁵³ 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

"new rule" does not establish that state rules are irrelevant to determining whether a rule is "new."⁵⁴ In *Ford*, the Court looked to state law for "objective evidence of contemporary values"⁵⁵ and noted that 26 states had enacted statutes prohibiting the execution of insane persons while other states adhered to the common law principle prohibiting such executions.⁵⁶ Although the *Teague* plurality did not explain *why Ford* should be considered a "new rule," the Court's discussion in *Penry* suggests that any substantive eighth amendment rule that "prohibits imposing the death penalty on a certain class of defendants because of their status or because of the nature of their offense" will be "new" because of its sweeping and categorical nature,⁵⁷ even though such a rule may be premised on a finding that contemporary values, manifested through legislative enactments, already condemn such punishment.⁵⁸ The fact that a rule is inherently ground-breaking insofar as it announces a new, categorical rule of substantive eighth amendment law thus appears to outweigh the fact that the rule derives from these indicia of community consensus.

⁵⁴ See *Teague*, ___ U.S. at ___, 109 S.Ct. at 1070.

⁵⁵ *Ford*, 477 U.S. at 406, 106 S.Ct. at 2600.

⁵⁶ *Id.* at 408-09 & n. 2, 106 S.Ct. at 2601 & n. 2.

⁵⁷ *Penry*, ___ U.S. at ___, 109 S.Ct. at 2951 (citations omitted). Such a rule would, however, necessarily fall within the first exception to *Teague* and would be applied retroactively. See *ibid.*

⁵⁸ *Ibid.*; see *Stanford v. Kentucky*, ___ U.S. ___, ___, 109 S.Ct. 2969, 2975, ___ L.Ed.2d ___, ___ (1989); *Thompson v. Oklahoma*, 487 U.S. ___, 108 S.Ct. 2687, 2691, 101 L.Ed.2d 702 (1988); *Enmund v. Florida*, 458 U.S. 782, 788-96, 102 S.Ct. 3368, 3371-76, 73 L.Ed.2d 1140 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97, 97 S.Ct. 2861, 2866-68, 53 L.Ed.2d 982 (1977).

The *Teague* plurality's citation of *Ford* cannot, therefore, be construed as a broad holding regarding the proper role of state law in determining whether a rule is "new." At most, *Teague*'s citation of *Ford* indicates that the existence of state common law and statutes embodying principles later incorporated into eighth amendment law does not preclude a finding that the rule is nevertheless "new." It does not command us to ignore state law and, in particular, it does not indicate that state court interpretations of the federal Constitution are irrelevant to determining whether a rule is "new" under *Teague*.

Indeed, the majority's refusal to address the import of a state's interpretation of the federal Constitution misconstrues the basis of *Teague*'s retroactivity principles. The plurality opinion in *Teague* anchored its retroactivity analysis, the majority recognizes, in the principles of federalism and finality; it sought to mitigate the uncertain effect of new and unanticipated obligations on final state court judgments.⁵⁹ The majority ignores, however, a basic precept of federalism that animated the *Teague* plurality: state courts, no less than federal courts, may meaningfully interpret the federal Constitution. "It is intolerable," Justice Harlan asserted, "that [the Supreme Court] take to [itself] the sole ability to speak to . . . issues of federal constitutional law;" the decision of an "inferior" court, "cognizant of the Federal Constitution and duty bound to apply it," should not be deemed "forever erroneous because years later th[e] Supreme Court took a different view of the relevant constitutional

⁵⁹ *Teague*, ___ U.S. at ___, 109 S.Ct. at 1070-75 (O'Connor J., plurality opinion).

command."⁶⁰ The majority's failure to acknowledge and give effect to Louisiana's prohibition of *Caldwell*-type error prior to *Caldwell* minimizes the role of state courts in our federal constitutional framework and devalues the importance of the dialogue by which state and federal courts articulate evolving federal constitutional norms.⁶¹

Sawyer did not raise his *Caldwell* claim on direct review, and, on collateral review, the Louisiana courts summarily rejected the argument on its merits. Although our conclusion on the merits of Sawyer's claim differs from that reached by the Louisiana courts on collateral review, we rely on the same constitutional principles that the state courts considered, not on some "new" constitutional rule unanticipated by the Louisiana Supreme Court. An advocate of even the narrowest view of the appropriate role of collateral review could not maintain that principles of federalism and finality preclude habeas relief whenever a federal court, applying the same constitutional principles as the state court, reaches a different conclusion on the merits of a petitioner's claim. This minimal "backstop" function of collateral review to which the majority refers remained untouched by *Teague*.

We are aware that the Court's decision in *Penry* implies that the "new rule" analysis is properly focused on one state when the proposed rule is directed at the procedure of a particular state, but may be broader when the

⁶⁰ *Mackey v. United States*, 401 U.S. 667, 680, 689-90, 91 S.Ct. 1160, 1174, 1178, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in the judgment).

⁶¹ See Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977).

proposed rule would apply to all states.⁶² We therefore, do not suggest that Louisiana's anticipation of *Caldwell* is dispositive⁶³ of whether *Caldwell* was a new rule, for *Caldwell* error is not restricted to Louisiana's sentencing procedure. At a minimum, however, the adoption of *Caldwell*-type rules by numerous states, including Louisiana, prior to *Caldwell* reveals the degree to which the Court's eighth amendment jurisprudence compelled the result reached in *Caldwell*.

III.

Even if *Caldwell* announced a new rule, it nevertheless should be applied to cases on collateral review because it falls within the exception provided by *Teague* for new rules requiring the observance of "those procedures that . . . 'are implicit in the concept of ordered liberty,' " that "implicate the fundamental fairness of the trial," and "without which the likelihood of an accurate conviction is seriously diminished."⁶⁴

The plurality in *Teague* diverged from Justice Harlan's approach to retroactivity by adding an "accuracy"

⁶² See *Penry*, ___ U.S. at ___ - ___, 109 S.Ct. at 2943-47, 2951.

⁶³ See *Teague*, 109 S.Ct. at 1070 (citing *Ford*, 477 U.S. at 410, 106 S.Ct. at 2602).

⁶⁴ *Teague*, ___ U.S. at ___, 109 S.Ct. at 1075-77 (O'Connor, J., plurality opinion) (quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (Harlan, J., concurring in the judgment) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937))).

qualification to the "fundamental fairness" exception, implying that only those rules touching on factual innocence would fall within it.⁶⁵ While Justice Harlan had subscribed to this view in his dissent in *Desist*,⁶⁶ he subsequently rejected it in *Mackey*, acknowledging that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."⁶⁷ The majority admits that the *Teague* plurality's modification of Justice Harlan's second exception does not command a majority of the Court, and although a solid majority of the Court employed *Teague*'s retroactivity analysis in *Penry*, *Penry* did not address the *Teague* plurality's gloss of the fundamental fairness exception.⁶⁸

The Court's unanimous recognition in *Penry* that *Teague*'s first exception encompasses a distinct eighth amendment component⁶⁹ suggests that the Court would find a parallel component in *Teague*'s second exception, and exempt from *Teague*'s nonretroactivity rule those capital sentencing procedures that ensure the "accuracy" of the sentencer's determination. The plurality in *Teague* acknowledged that "a criminal judgment necessarily includes the sentence imposed."⁷⁰ Both the plurality and

⁶⁵ See *Teague*, ___ U.S. at ___, 109 S.Ct. at 1080 (Stevens, J., concurring in part and concurring in the judgment).

⁶⁶ See *Desist*, 394 U.S. at 262, 89 S.Ct. at 1041 (Harlan, J., dissenting).

⁶⁷ *Mackey*, 401 U.S. at 694, 91 S.Ct. at 1181 (Harlan, J., concurring in the judgment).

⁶⁸ See *Penry*, ___ U.S. at ___, 109 S.Ct. at 2943, 2953.

⁶⁹ *Ibid.*

⁷⁰ *Teague*, ___ U.S. at ___ n. 3, 109 S.Ct. at 1077 n. 3 (O'Connor, J., plurality opinion).

dissent in *Teague* would, therefore, agree that *Teague*'s exemption of new rules that ensure the accuracy of the determination of the defendant's guilt or innocence includes new rules that ensure the accuracy of the sentencer's determination that a particular defendant deserves the death penalty.⁷¹

The rule *Caldwell* announced, based on the "heightened 'need for reliability' " in capital sentencing,⁷² satisfies *Teague*'s second exception: *Caldwell* error undermines the eighth amendment's requirement that responsible jurors produce individualized, reliable verdicts, and thus seriously diminishes the likelihood of an accurate sentence. As Justice O'Connor emphasized in her concurrence in *Caldwell*: "[T]he prosecutor's misleading emphasis on appellate review misinformed the jury, . . . creating an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily and capriciously' . . . or through 'whim or mistake.' "⁷³ For the majority to ignore the effect of *Caldwell* error on the reliability and accuracy of the sentence seriously

⁷¹ See *ibid*; *id.* at ___ n. 5, 109 S.Ct. at 1089 n. 5 (Brennan, J., dissenting); cf. *Adams*, ___ U.S. at ___, 109 S.Ct. at 1217-18 n. 6; *id.* at ___ n. 4, 109 S.Ct. at 1219 n. 4 (Blackmun, J., dissenting); *Ramos*, 463 U.S. at 1007-09, 103 S.Ct. at 3457.

⁷² *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645 (quoting *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

⁷³ *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451 and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

misapprehends the nature of a *Caldwell* violation and the reasons behind the Court's decision to prohibit it.

To justify its conclusion that *Caldwell* does not satisfy *Teague*'s second exception, the majority relies primarily on *Dugger v. Adams*,⁷⁴ in which the Court held that refusing to consider a petitioner's procedurally-barred *Caldwell* claim would not result in a "fundamental miscarriage of justice."⁷⁵ Acknowledging that *Adams* scrutinized "the facts of a particular case, while the *Teague*[-]ordered liberty standard looks to the character of the general rule asserted," the majority nonetheless dismisses this distinction as more semantic than substantive.

Whether or not the principles underlying the procedural default and retroactivity doctrines are similar, there is a substantial difference between denying a *particular petitioner* the benefit of a rule based on the unique facts of his case, and holding that *no petitioner*, whatever his situation, may benefit from retroactive application of the rule to his case. The Court recognized this distinction in *Adams*, stating that "[d]emonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received."⁷⁶ Under *Teague*, we must address the nature of *Caldwell* error, not the specific facts of *Sawyer*'s case.

⁷⁴ ___ U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

⁷⁵ *Id.* at ___ n. 6, 109 S.Ct. at 1217-18 n. 6.

⁷⁶ *Ibid.*

The majority conflates the individual and the categorical in order to obscure the ultimate import of its holding – that the eighth amendment values *Caldwell* articulated constitute an unwarranted innovation in eighth amendment jurisprudence and are insignificant in the pantheon of values present in criminal procedure. *Caldwell* is worthy of higher esteem, for the Supreme Court found *Caldwell* error so destructive of the fundamental right of a defendant assured by the eighth amendment to a reliable and accurate sentence that it presumed the error to be prejudicial unless the state demonstrated otherwise.⁷⁷ Not all errors in the capital sentencing context are so critical. For example, a death sentence based on an aggravating factor invalid under state law, but supported by evidence properly before the sentencer, does not sufficiently implicate the accuracy of the sentencing process to warrant a presumption of prejudice.⁷⁸ Prejudice is assumed, however, when the sentencer has not been allowed to consider or give effect to relevant mitigating evidence,⁷⁹ when an aggravating factor is premised on incorrect or invalid evidence,⁸⁰ or when the jury's sense of responsibility has been undermined.⁸¹

⁷⁷ *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

⁷⁸ See *Barclay v. Florida*, 463 U.S. 939, 956-57, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983); *Zant v. Stephens*, 462 U.S. 862, 887-88, 103 S.Ct. 2733, 2748, 77 L.Ed.2d 235 (1983).

⁷⁹ See *Hitchcock v. Dugger*, 481 U.S. 393, 397, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 8, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986).

⁸⁰ See *Johnson v. Mississippi*, 486 U.S. ___, ___, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988).

⁸¹ See *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

IV.

The majority acknowledges that the death penalty "is different from all other [punishments] in many respects." Yet, by denying that *Caldwell* interpreted and applied consistently the Court's eighth amendment jurisprudence to new facts, and by refusing to accord the heightened need for reliability in capital sentencing a role in *Teague*'s fundamental fairness exception, the majority eviscerates the procedural protections on which the constitutionality of this ultimate and irreversible penalty is premised. The majority has, in effect, given finality concerns greatest force in the area where the eighth amendment requires that we be most wary. We cannot agree that a state's interest in the finality of a judgment of death outweighs a defendant's right that a sentencing jury, accurately informed of its role and responsibility, determine his moral culpability. Society takes little delight in the grim, but sometimes necessary, exception of a criminal defendant; its investment is in the informed, deliberative process by which the state's taking of a life is made legitimate.

It is indeed ironic that the majority invokes *Teague*, undoubtedly a new rule,⁸² to prevent us from applying *Caldwell*, which is at most an extension of settled doctrine. If any case should be considered as having established a new rule not retroactively applicable to habeas

petitioners whose convictions have become final it is *Teague* itself. Had the majority decided Sawyer's case on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted to this court, the majority opinion would have granted him a new sentencing hearing. The majority instead reaches out to an opinion rendered by the Supreme court 16 months after submission of Sawyer's case and 8½ years after Sawyer's trial to find a reason to deny him constitutional protection. That to us is a finality of sorts, a final and irretrievable absurdity.

⁸² See *Teague*, ___ U.S. at ___ nn. 3 & 4 109 S.Ct. at 1086 nn. 3 & 4 (Brennan, J., dissenting); compare *id.* at ___, 109 S.Ct. at 1060-78 (O'Connor, J., plurality opinion) with *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Desist*, 394 U.S. 244, 89 S.Ct. 1030; *Mackey*, 401 U.S. 667, 91 S.Ct. 1160; *Solem*, 465 U.S. 638, 104 S.Ct. 1338.

Supreme Court of the United States

No. 89-5809

Robert Sawyer,
Petitioner

v.

Larry Smith, Interim Warden

ON PETITION FOR WRIT OF CERTIORARI to the United
States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be, and
the same is hereby, granted.

January 16, 1990
